In The

Supreme Court of the United States

October Term, 1978

No. 78-161

State of Iowa, State Conservation Commission of the State of Iowa,

Petitioners,

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, R.G.P. Incorporated, Darrell L., Harold, Harold M. and Luea Sorenson, Harold Jackson, Otis Peterson and Travelers Insurance Company,

Respondents (Petitioners on Separate Petitions),

vs.

Omaha Indian Tribe and United States of America,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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—o—

The above-named petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 11, 1978.

—o—

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 575 F. 2d 620, appears as Appendix A hereto. The memorandum opinion and the findings of fact and conclusions of law of the District Court for the Northern District of

Iowa are reported, *United States v. Wilson*, 433 F. Supp. 67. Copies appear as Appendix C hereto.

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JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 11, 1978. A timely petition for rehearing, with suggestion that rehearing be in banc, was filed on April 25, 1978 and denied on May 2, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of Iowa is "a white person", and the Omaha Indian Tribe is "an Indian" within the meaning of 25 U. S. C. § 194.

2. Whether the State of Iowa may be divested from title to land within its boundaries on the mere possibility that the land had been owned by Indians more than a century ago.

3. Whether a statute which allocates the burden of proof in a trial concerning property on the basis of the litigants' classification as "an Indian" and as "a white person" violates the due process and equal protection guarantees of the Fifth Amendment.

4. Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code, Title 25

§ 194. *Trial of right of property; burden of proof*

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R. S. § 2126.

Derivation. Act of June 30, 1834, C. 161, § 22, 4 Stat. 733.

United States Constitution, Amendment V, Due Process Clause

> No person shall . . . be deprived of life, liberty or property, without due process of law;

United States Constitution, Amendment X

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Other statutory provisions referred to herein as helpful in interpreting § 194 are included in Appendix E. They are the following:

> An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers,

approved March 30, 1802, sections 4 and 12, 2 Stat. 139, 141, 143.

An act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers", approved thirtieth of March, one thousand and eight hundred and two, approved May 6, 1822, Section 4, 3 Stat. 682, 683.

An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved June 30, 1834, sections 12, 16 and 22, 4 Stat. 729, 730, 731, 733.

STATEMENT OF THE CASE

This is a Petition by the State of Iowa for a Writ of Certiorari to review an order of the Eighth Circuit Court of Appeals reversing the United States District Court for the Northern District of Iowa and divesting the State of Iowa and other Iowa title-holders from possession and ownership of 2900 acres of land adjacent to the Missouri River in the State of Iowa. The Court of Appeals quieted title to the land in the Omaha Indian Tribe. Prior to the Court of Appeals decision, the Omaha Indian Tribe's reservation lay entirely on the opposite bank of the river, in the State of Nebraska. The basis for the Court's decision is a federal statute enacted in 1834 and never applied in any reported case. It states:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

25 U. S. C. § 194 (1970).

The Eighth Circuit Court of Appeals improperly reversed the trial court's ruling that the statute does not apply. In doing so, the Court of Appeals committed three fundamental errors: it held, without explanation, that the sovereign State of Iowa, which is comprised of citizens of diverse racial extraction, including Indians, Orientals, Mexican-Americans and Blacks, is a "white person" and therefore subject to the statute; it relied on a statute unconstitutional on its face, and as applied; and it reversed the trial court's finding of fact that the land involved was never in possession of the Omaha Indian Tribe or its members and, therefore, that the quoted statute did not apply (and it did so by applying the above-quoted statute on the *possibility* that the land had been in the possession of Indians in the distant past).

The Eighth Circuit's reading of "white person" to include the State of Iowa, thereby placing the burden of proof upon the State-defendant in a dispute involving land apparently owned by it, violates established constitutional principles of Federalism. This is particularly true in this case, where there is *no* indication that Congress ever intended such a reading of the statute and, in fact, such a reading would violate the plain meaning of the words both in the sense of their common usage and as interpreted by this court in other contexts.

The statute classifies litigants strictly and solely on the basis of race, and allocates the burden of proof on the basis of that classification. Burden of proof was outcome determinative; the Court of Appeals' decision, if allowed to stand, will result in the divestiture in every such case of every litigant classified as a "white person"

from possession of and apparent good title to land. A litigant so classified is thereby severely disadvantaged vis-a-vis an Indian plaintiff seeking to remove him. He is also severely disadvantaged when compared to a non-white person defendant, Indian or not, in whose case there is no such presumption. The statute does all of this without any findings, legislative or otherwise, of past discrimination. Indeed, such findings would not be possible regarding the State of Iowa. Such a statute plainly constitutes an exercise of Congressional power in an inappropriate manner with relation to the states.

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REASONS FOR GRANTING THE WRIT

1. 25 U. S. C. § 194 is not applicable in a trial between a sovereign state of the United States and an organized Indian tribe represented by the United States Government.

The statute here in issue, 25 U. S. C. § 194, states,

> In all trials about the right of property in which *an Indian* may be a party on one side, and *a white person* on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. (Emphasis added.)

The State of Iowa is not "a white person", but on the contrary, is a sovereign state of the United States, made up of millions of individuals of diverse racial extraction, including Indians, as well as Blacks, Orientals,

Mexican-Americans and Caucasians. Reading "person" to include states violates the plain meaning of the words used, both in the sense of their common usage and as interpreted by the Court in other contexts. See, e. g., *South Carolina v. Katzenbach,* 383 U. S. 301, 324 (1966). Much less is this interpretation appropriate when the term used is "white person". *United States v. Perryman,* 100 U. S. 235 (1880).

And the above quoted statute, on its face, applies to individual Indians, and not to a tribe of Indians. The history of the legislation shows that the term "Indian" was used advisedly in the singular. The predecessor to 25 U. S. C. § 194 first appeared in an 1822 act to regulate trade and intercourse with the Indian tribes, and the word "Indians," in the plural, was used. In 1834, the term was changed to "Indian", in the singular, making it clear that the statute was intended to be applied to individual Indians, and not to groups of Indians (App. E).

This is further verified from the fact that § 12 of the act was also amended in 1834. In its 1802 form, § 12 declared any conveyance of land "from any *Indian or* nation or tribe of Indians" invalid, unless conveyed by treaty or convention. In 1834 the words "Indian, or" were deleted. It is evident from this that Congress intended to accord the protection of § 12 to nations or tribes of Indians, only, and the protection of § 22 (now § 194) to individual Indians, only.

In addition, it is clear that the statute was intended for the protection of individual Indians who might otherwise be the subject of fraud and overreaching on the part of a white person. It follows from this that the word

"Indian" was not intended to apply to a tribe of Indians represented by the United States Government. Likewise, there is no indication of any congressional purpose to protect an Indian from fraud and overreaching on the part of a sovereign state of the United States. Yet this is a necessary implication of the Court of Appeals' ruling.

If followed, this ruling will result in the application of 25 U. S. C. § 194, in property disputes involving Indians against any State of the United States and the Federal Government itself, and may result in the divestiture of countless acres of State and Federal lands.

2. The Court of Appeals determined the issue before it and divested the State of Iowa from title to the land on the mere possibility that it had been owned by Indians in the distant past.

25 U. S. C. § 194 provides that the burden of proof shall rest upon the white person,

> ". . . whenever the Indian shall make out a presumption of title in himself from the *fact of previous possession or ownership.*" (Emphasis added.)

The foundational fact which must be proven before § 194 can be invoked is that the Indian had "previous possession or ownership" of the disputed property. This was the ultimate issue to be decided in the case at bar. And the trial court found, on the basis of the evidence presented, that the land was never in the possession of the Omaha Indian Tribe, but on the contrary, was land formed on the Iowa bank of the River between 1875 and 1923, many years after Indian land in the same locality was washed away and destroyed by the River.

The Eighth Circuit Court of Appeals, however, invoked § 194 upon the foundational fact that an 1867 survey showed a portion of the Omaha Indian Reservation, on the Nebraska bank of the River, occupied the disputed area *at the time of the survey.* Then the Court of Appeals, applying § 194, cast the burden of proof on the State of Iowa, and reversed the trial court's finding that the Indian land had been washed away and destroyed by the River and replaced by new land on the opposite bank of the River. The most that can be said for the Court of Appeals' ruling is that it invoked § 194 on a mere possibility that the land in issue was in the possession of Indians more than a century ago.

The Court of Appeals necessarily committed one or both of two errors: it applied § 194 in the absence of the "fact of previous possession or ownership"; and it utilized the authority of the statute to find the fact which was requisite to the statute's application. And in doing so, it reversed the trial court's opposite finding. This involuted reasoning circumvents any recognized judicial fact finding process envisioned by the Due Process Clause to the Fifth Amendment.

The Court of Appeals determined the issue before it on the basis of this application of 25 U. S. C. § 194, and divested the State of Iowa from apparent good title to the land. The decision, if followed in other cases, would have incalculable results, because, according to the Court of Appeals' reasoning, a presumption of good title arises in favor of Indians whenever it may be shown that Indians *might at one time* have had possession or ownership of the land in issue. This would involve vast quantities

of land privately owned and owned by the various states of the United States and by the United States Government itself.

3. 25 U. S. C. § 194 is unconstitutional on its face and as applied.

25 U. S. C. § 194 places the burden of proof in any property dispute upon a white person litigant in any trial where an Indian is a party on the other side and the Indian makes out a presumption of title in himself from the fact of previous possession or ownership. Thus, litigants are classified on the basis of race, and burden of proof is allocated on the basis of that classification.*

Any litigant classified as "a white person" is severely disadvantaged vis-a-vis a litigant classified as "an Indian" who seeks to remove him. He is also severely disadvantaged when compared to a non-white person litigant, Indian or not, who litigates against an Indian and against whom there is no such presumption. And

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* "The word 'person' in the context of the Due Process Clause of The Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union. . . . [However] objections to the Act which are raised under these provisions may be considered . . . as additional aspects of the basic question presented by the case: Has Congress exercised its powers . . . in an appropriate manner with relation to the States?" South Carolina v. Katzenbach, 383 U. S. 301, 323-24 (1966).

One of the ironies of this case is that while the state is not a "person" for purposes of direct application of Fifth Amendment protection of property rights, under the Eighth Circuit Court of Appeals' decision below the state is considered a "white person" for purposes of *divesting* it of its property.

given the Eighth Circuit Court of Appeals' holding regarding proof of the foundational fact of previous possession or ownership, the sweep of the statute's application is greatly expanded, and the disadvantage to "white person" litigants is greatly augmented.

The statute does this without any findings, legislative or otherwise, of past discrimination, or of any coherent rationale upon which the effects of past discrimination may be remedied by the statute. *Regents of the University of California v. Bakke*, — U. S. — (1978). And, indeed, such findings would not be possible regarding the State of Iowa.

4. The Court of Appeals decision violates established principles of Federalism.

The land here in dispute lies along the banks of the Missouri River entirely within the boundaries of the State of Iowa. The Court of Appeals' application of federal law to this case violates the long standing federal commitment to apply state law to settle real property disputes, including questions of riparian rights along navigable rivers within the boundaries of the various states. In *Oregon v. Corvallis Sand and Gravel Co.*, 429 U. S. 363, 370 (1977), this Court held,

> ". . . Although Federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasement by operation of any federal common law."

It follows from this that a reservation of land west of the Missouri River to the Omaha Indian Tribe in 1854

could not defeat the previous grant to the State of Iowa at the time of its admission to the Union in 1846; and such reservation to the Tribe does not furnish an adequate basis for application of federal law to defeat titles apparently good in Iowa. Nor does the fact that the Missouri River was the boundary between Iowa and Nebraska, and between Iowa and the Omaha Indian Reservation, before the Iowa-Nebraska Boundary Compact of 1943, require application of Federal law different from State law. Potential disputes concerning the location of the boundary were settled by the Boundary Compact, and there is no way this litigation can affect it. Finally, there is nothing in the language of 25 U. S. C. § 194 or its legislative history to indicate that Congress intended it to be applied against a sovereign state of the United States.

CONCLUSION

The Court of Appeals' opinion, if followed, could have fantastic results. It could operate to divest any non-Indian litigant, including States and the Federal Government, from apparent good title to land, whenever it could be shown that Indians might, in the distant past, have had possession or ownership.

Respectfully submitted,

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In the Supreme Court

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BRIEF OF AMICUS CURIAE
State of California in Support of the State of Iowa's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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State of California in Support of the
State of Iowa's Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

AUTHORITY TO FILE AMICUS CURIAE BRIEF

The State of California, by and through its State Lands Commission and by and through its Attorney General, Evelle J. Younger, respectfully submits this brief as amicus

curiae under authority of Rule 42(4), United States Supreme Court Rules. This brief is submitted in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit filed by the State of Iowa and the State Conservation Commission of the State of Iowa.

INTEREST OF AMICUS CURIAE

Notwithstanding this Court's recent, unequivocal affirmation of the Equal-Footing Doctrine, the decision below divested the State of Iowa of title to lands underlying the Missouri River, lands which devolved upon Iowa as a sovereign upon admission to the Union in 1846. In the course of its decision, breaching another incident of Iowa's sovereignty, the Court employed "federal common law" to ascertain the boundaries of lands wholly within the boundaries of the State. These acts of the Court below, if allowed to stand, could severely impinge on the sovereignty of California. For in the same capacity as the other States, California holds in trust for all its citizens title to millions of acres of sovereign lands. And in California too are millions more acres of land whose private titles since statehood have been the unquestioned province of California courts, whose landowners have relied for more than a hundred years on the continued application to their titles of California law. California is also a party to litigation concerning hundreds of miles of the Colorado River where the principles of this case could have marked effect. California is thus vitally interested in the outcome of this case.

As with all other States admitted after the formation of the Union, California acquired as an attribute of sovereignty title to the lands underlying navigable waters within its boundaries upon admission to statehood. *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370 (1977) (hereinafter "Corvallis"); *Weber v. Harbor Commissioners*, 18 Wall. 57, 65 (1873). An additional, and no less indispensable incident of its sovereignty is ". . . the power of the State's courts to determine and apply state property rules in the resolution of conflicting claims to that property." *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 323 (1973) (Stewart, J., dissenting; the views of Mr. Justice Stewart were adopted when the Court overruled *Bonelli* in *Corvallis, supra*, 429 U.S. at 381-382). In this case, the Eighth Circuit's novel construction of Title 25 U.S.C. section 194 (hereinafter "Section 194"), and its asserted application of federal common law in an area properly determined by state law will, if the writ of certiorari is not granted, jeopardize principles at the very foundation of federalism, the Tenth Amendment to the Constitution and the Equal-Footing Doctrine.

The ramifications of the Eighth Circuit's decision are vast. The choice-of-law principles adopted and application of the presumption purportedly created by Section 194 by the Court of Appeals, if not overturned, will, in sovereign land title cases concerning Indian claims, affect sovereign land titles held in millions of acres of land in every State of the Union, titles held by the States in trust for their citizens. The States' sovereign title and their trust obligations have been established in our jurisprudence since *Pollard's Lessee v. Hagan*, 3 How. 212 (1845). Cases of the

States' sovereign rights in land have long been considered among the most important controversies before the Court, ". . . either as . . . respects the amount of property involved, or the principles on which the . . . judgment proceeds . . . ." *Id.* at 235 (Catron, J., dissenting.)

For the reasons briefed below, the State of California respectfully requests that its contentions be considered with the petition for certiorari filed by the State of Iowa and the Iowa Conservation Commission (hereinafter "Iowa").

BRIEF OF AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether the selection of federal common law to determine land title breaches the Tenth Amendment to the Constitution.

2. Whether the presumption created by Title 25, U.S.C., section 194, as applied by the Eighth Circuit to the sovereign State of Iowa, is inconsistent with the Equal-Footing Doctrine or the Tenth Amendment to the Constitution.

SUPPLEMENTARY STATEMENT OF THE CASE

The United States Court of Appeals for the Eighth Circuit reversed judgment in favor of Iowa and other non-Indian claimants quieting title to lands in the present bed of the Missouri River and other lands directly east thereof (hereinafter "Barrett Survey Area") against the Omaha Indian Tribe ("Omahas") and the United States, acting as trustee for the Omahas.

In December, 1846, Iowa was admitted to the Union with, *inter alia*, its western boundary adopted as the center of the main channel of the Missouri River. In March, 1854, eight years after Iowa had acquired title to the Missouri River *east* of its main channel and the concomitant authority to apply its own property law to lands within its borders, the Omahas entered into a treaty with the United States. In that treaty the Omahas ceded certain lands to the United States and reserved ". . . for their future home . . ." other lands acceptable to the Omahas not to exceed 300,000 acres bounded on the *east* by the main channel of the Missouri River. Act of March 16, 1854, Art. 1, 10 Stat. 1043. Those reserved lands included the Barrett Survey Area then located in the Territory of Nebraska, *west* of the center of the main channel of the Missouri River.

By 1943, however, the uncontrollable Missouri River had wandered more than two miles west of its assumed location in 1854. As a result the Barrett Survey Area formerly located on the *west* (Nebraska) side of the Missouri River was now located on the *east* (Iowa) side of the Missouri River. The dispute in this case is whether the movement of Missouri, the boundary of the Omahas' reservation, was the result of the gradual and imperceptible process of accretion and erosion, as asserted by Iowa and the non-Indian claimants, or the sudden and perceptible process of avulsion, as claimed by the Omahas and the United States.

Essentially, Iowa and the non-Indian claimants aver that the Barrett Survey Area was washed away by gradual river action, and that the lands now located in the Barrett Survey Area are alluvial depositions to Iowa riparian

land and that by this process the Omaha reservation boundary moved. The non-Indian claimants or their predecessors in interest had occupied the land from the early 1900's until April 2, 1975, when the Omahas, with assistance of the Bureau of Indian Affairs, seized possession of the land and began farming it.

Thereafter, the Omahas brought suit to quiet title to the Blackbird Bend area now lying in Monoma County, Iowa. Iowa and the non-Indian claimants asserted title to that same area and also sought to quiet title thereto.

At trial, the District Court determined that each side would bear the burden of persuasion as to the facts establishing their respective claims, disregarding Section 194, which the Omahas and the United States claimed reallocated such burden to Iowa and the non-Indian claimants. *United States v. Wilson,* 433 F.Supp. 57, 66 (N.D. Iowa, 1977) (hereinafter "Wilson I"). The District Court found that the river, and hence the boundary of the Omahas' reservation, moved westward through the process of accretion and erosion as contended by Iowa and the non-Indian claimants. It further found that the United States and the Omahas failed to prove that the river moved by any sudden change. Title to the Barrett Survey Area was therefore quieted in Iowa and the non-Indian claimants. *United States v. Wilson,* 433 F.Supp. 67, 88-92 (N.D. Iowa, 1977) (hereinafter "Wilson II").

On appeal, the Eighth Circuit applied Section 194, having found historical possession or ownership, by treaty, to the lands within the Barrett Survey Area as such lands existed in 1854. In so doing the Court of Appeals disputed the District Court's reasoning that to apply Section 194 would require, before all the evidence had been heard, a determination on the merits—that the river had changed by avulsion; for if it had changed otherwise the Indians' title would have continued to be bounded by the river. *Wilson I, supra,* 433 F.Supp. at 66. Thus, pursuant to Section 194, Iowa and the non-Indian claimants were required to assume the burden of proving the reservation boundary shifted by reason of accretion. *Omaha Indian Tribe, Treaty of 1854, etc. v. Wilson,* 575 F.2d 620, 650-651 (8th Cir., 1978) (hereinafter "Wilson III"). Holding further that Iowa and the non-Indian claimants failed to sustain what it recognized as "indeed an onerous burden" of proving events occurring over 100 years ago, the Court of Appeals vacated the District Court's judgment and remanded the case with directions to enter judgment quieting title to the Barrett Survey Area—including river lands in the present bed of the Missouri River, east of the main channel—in the Omahas and the United States as trustee. *Id.* at 651.

REASONS FOR GRANTING THE WRIT

1. The writ should be granted to consider whether the selection of federal common law to determine land title breaches the Tenth Amendment to the Constitution.

The classic expression of the force of the Tenth Amendment is found in *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). In that case, Justice Brandeis, after setting forth the reasons for the decision and the background of the

rule of *Swift v. Tyson*, 16 Pet. 1 (1842), wrote for the Court:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State . . . There is no federal general common law. Congress has no power to declare substantive rules of common law in a state . . . and no clause in in the Constitution purports to confer such a power upon the federal courts . . . [In applying the doctrine of *Swift v. Tyson*] . . . *this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.*" *Id.* at 78-80. (Emphasis added.)

One of the principal aims of *Erie* was to avoid ". . . inequitable administration of the laws." *Hanna v. Plummer*, 380 U.S. 460, 468 (1965). The rule of *Erie* is fully applicable in cases, such as the present, in which federal jurisdiction is invoked on the basis that the action is brought by the United States (28 U.S.C. section 1345) and an Indian tribe (28 U.S.C. section 1362). See *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973). It is an element of the Constitutional sovereignty of the States. *Corvallis, supra*, 429 U.S. at 381; *Bonelli Cattle Co., supra*, 414 U.S. at 333 (Stewart, J., dissenting).

In a line of cases extending from *Pollard's Lessee v. Hagan*, 3 How. 212 (1845), through *Corvallis, supra*, this Court has held that determinations concerning land title are matters for the application of state law. *See, e.g., Barney v. Keokuk*, 94 U.S. 324 (1876); *Packer v. Bird*, 137 U.S. 661 (1891); *St. Louis v. Rutz*, 138 U.S. 226 (1891); *Shively v. Bowlby*, 152 U.S. 1 (1894).

And that these are matters of state law is the rule in cases of Indian lands as well. *Oklahoma v. Texas*, 258 U.S. 574, 594-595 (1922); *United States v. Oklahoma Gas Co.*, 318 U.S. 206 (1943); *Herron v. Choctaw & Chickasaw Nations*, 228 F.2d 830 (10th Cir., 1956); See *Francis v. Francis*, 203 U.S. 233 (1906).

The Eighth Circuit grounded its decision to employ federal common law on two purported bases: first, the fact that an interstate boundary was "concerned"[1]; second, "the special relationship between the United States and the Omaha Indian Tribe and the nature of the interest litigated." *Wilson III, supra*, 575 F.2d at 628, 629. As to the Court's first reason, the fact that the center of the river was once the Nebraska-Iowa boundary in no way suggests that federal law apply to cases of land title on either side of that boundary. Quite the opposite is true:

> "How land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each state, under the familiar doctrine that it is for the states to establish for themselves such rules of property as they deem expedient with respect to the navigable waters

[1]The Eighth Circuit based this conclusion on a statement in *Corvallis, supra*, 429 U.S. at 375. That statement was only dictum in *Corvallis*, in which no interstate boundary was involved; and the statement was recognized by the Court's opinion to be applicable only in a severely limited class of cases—original-jurisdiction cases involving disputes between two states over an interstate boundary. *Id.*

within their borders and the riparian lands adjacent to them. [Citation omitted.]" *Arkansas v. Tennessee,* 246 U.S. 158, 175-176 (1918).[2]

See also Nebraska v. Iowa, 406 U.S. 117, 126-127 (1972). Since federal common law controls the interstate boundary, and state law the boundaries of private titles, there may well be two systems of boundaries when federal law and state law treat river changes differently. The Eighth Circuit's assumption that any claimed change in the eastern boundary of the reservation would concern the boundary between Iowa and Nebraska, requiring the application of federal law, *Wilson III, supra,* 575 F.2d at 628, is thus plainly mistaken. Moreover, the fact that the interstate boundary had long been fixed in location by compact renders the Eighth Circuit's reasoning on this point even less tenable. Iowa-Nebraska Boundary Compact of 1943, Iowa Code 1971, p. lxiv; Iowa Acts 1943, c. 306; Nebraska Laws 1943, c. 130; Act of July 12, 1943, 57 Stat. 494; *see Nebraska v. Iowa, supra,* 406 U.S. at 119-120.

The Eighth Circuit's other reason for choosing federal law—the "special relationship" between the Omahas and the Government and the "nature of the interest litigated"—is also ill chosen.[3] The Court's reasoning conflicts

[2]The one qualification to this fact, to which the Court alludes obliquely, is inapplicable here. *Wilson III, supra,* 575 F.2d at 628. See also footnote 1.

[3]The Court announced its result in advance when it intemperately characterized defendants' claims as an "attempt to extinguish the aboriginal rights of the Omaha Indian Tribe, guaranteed by treaty. . . ." *Wilson III, supra,* 575 F.2d at 629. Such a characterization begs the very question, *viz.*, precisely what are those rights, or more specifically, what is the eastern boundary of the reservation?

with this Court's opinions in *Oklahoma v. Texas, supra,* 258 U.S. at 594-95, and *U.S. v. Oklahoma Gas Co., supra,* 318 U.S. at 209-210, holding that land-title questions concerning Indian tribal lands held under the guardianship of the United States are to be determined by the law of the state in which the lands lie. The decision further conflicts with the Tenth Circuit Court of Appeals' decisions in *United States v. Champlin Refining Co. et al.,* 156 F.2d 769, 773 (10th Cir., 1946) and *Herron v. Choctaw & Chickasaw Nations, supra,* 228 F.2d at 832 (10th Cir., 1956), to the same effect. The *Oklahoma Gas* case does suggest an exception to the rule if necessary to protect ". . . a less favored people against their own improvidence or the overreaching of others . . ." *id.* at 211, but application of the exception was not conceived to be necessary when Indians are subjected to the same rule of law as are others in the state. *Id.*

This Court of Appeals' holding also conflicts with another Eighth Circuit decision (unconvincingly distinguished by the panel, *Wilson III, supra,* 575 F.2d at 629) upholding a District Court determination that state, not federal law, should govern a case involving the very same Omahas, the identical reservation and claims of accretion along the Missouri River, the boundary of that reservation. *Fontenelle v. Omaha Tribe of Nebraska,* 430 F.2d 143 (8th Cir., 1970), affirming *Fontenelle v. Omaha Tribe of Nebraska,* 298 F.Supp. 855, 861 (D. Neb., 1969).

Finally, amicus contends that the Eighth Circuit's ruling also conflicts with this Court's opinion in *Francis v.*

Francis, 203 U.S. 233 (1906). That case addressed the issue whether fee title to land passed pursuant to a treaty between the United States and a tribe of Indians in the absence of a patent. In resolving the issue, this Court looked to the law of the State in which the reservation lay to see how courts of that State construed the treaty and whether that construction had become a rule of property in that State which, the Court held, should not be disturbed unless it clearly misinterpreted the treaty. *Id.* at 242. In this case, the choice-of-law determination by the Eighth Circuit ignored the applicable state rule of property—requiring the person who seeks to quiet title to prevail on the strength of his own title—a rule that does no violence to the terms of the Omahas Treaty. *Wilson I, supra,* 433 F.Supp. at 66.[4]

The Omahas' claims under that treaty must be interpreted according to the law of the State in which the reservation land lies. *Oklahoma v. Texas, supra,* 258 U.S. at 594-595.

The result of the Eighth Circuit's choice of federal law in Indian land-title disputes will lead to the inequitable administration of land titles in all states. A new scheme of federal common law for land title questions about Indian lands will be created side by side with the scheme of land title created by state law applicable to non-Indian lands.

The Court of Appeals choice-of-law determination shatters the principles of *Erie*. It ignores or conflicts with decisions not only in the Tenth Circuit and in this Court, but also in the Eighth Circuit itself. Further, the choice-of-law determination was made without any showing either of a significant conflict between some federal policy and the use of state law, or of a reason that state law should not govern the disposition of real property situated in that State. *See Wallis v. Pan American Pet. Corp.,* 384 U.S. 63, 69 (1966). That state law shall govern these dispositions is one of the elements of a State's sovereign rights reserved to the States by the Tenth Amendment. In addition, there was no indication that the Omahas were being subjected to a different rule of law from other citizens of Iowa. *See Oklahoma Gas Co., supra,* 318 U.S. at 211.

[4]Even if federal law were applicable, the Court of Appeals ignores this Court's requirement that parties claiming material changes in rivers, such as avulsions, carry the burden of proving them. *Oklahoma v. Texas,* 260 U.S. 606, 638 (1923).

2. The writ should be granted to determine whether the presumption created by operation of Title 25, U.S.C. Section 194, as applied by the Eighth Circuit to the sovereign State of Iowa, is in violation of the Equal-Footing Doctrine or the Tenth Amendment.

The Eighth Circuit's application of Section 194—in land-title litigation concerning sovereign river lands brought against a sovereign State by the United States and an Indian tribe—is unprecedented and bears close scrutiny because its effect is to divest the State of sovereign lands guaranteed by the Equal-Footing Doctrine. Moreover, in applying Section 194, the Court of Appeals ignored a presumption of ownership in favor of the sovereign in navigable rivers.

Section 194 provides that in trials between an Indian and a white person concerning property, the burden of

proof is placed on the white person ". . . whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." The Eighth Circuit found that the ". . . [Omahas] treaty established the [Omahas] as the legal titleholder to the land area within the Barrett Survey [Area, including lands in present bed of the Missouri River claimed to be sovereign lands of Iowa.] *Wilson III, supra,* 575 F.2d at 631. This finding, the Court held, raised the presumption of title required by Section 194. *Id.*

Having found "previous possession or ownership"[5] based upon physical conditions in 1867, in the Eighth Circuit held

> ". . . notwithstanding the subsequent movement of the thalweg of the Missouri River, the non-Indian claimants were required to assume the burden of proof to show that the Indians no longer had lawful title to the reservation land in question." *Wilson III, supra,* 575 F.2d at 633.

Thus, Iowa was required to prove the Omahas did not have lawful title to the bed of the Missouri River east of present main channel, land prima facie sovereign lands of Iowa.

This case is further aggravated because the United States, which has immunized itself from quiet-title actions concerning such lands, 28 U.S.C. 2409a(a), was able to

[5]It is not clear whether mere "aboriginal" title can constitute the previous possession or ownership sufficient to raise the presumption of title in an Indian tribe. "Aboriginal" possession or ownership is the non-treaty right of occupancy recognized by the United States in the nomadic Indian tribes, protected by the United States from third party intrusion and terminable only by the United States. See *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 279 (1955). Amicus does not understand "aboriginal" title to be involved in this case.

initiate this litigation and by operation of Section 194 saddled Iowa and the non-Indian claimants with the burden of proving their case, disregarding the plaintiff's traditional burden of proof. *Wilson I, supra,* 433 F.Supp. at 66; *Wilson II, supra,* 433 F.Supp. at 88. The shift of the burden is made despite the fact that the United States and the Indians are claiming the Missouri River moved by process of avulsion, a material change this Court has required the party asserting it to prove. *Oklahoma v. Texas, supra,* 260 U.S. at 638. Significantly, the Court itself euphemistically characterized this burden it imposed on Iowa and the non-Indian claimants as one that "may result in undesirable hardships." *Wilson III, supra,* 575 F.2d at 651.

Perhaps not the least of the evils of the decision, however, is its treatment of the presumption as effectively a conclusive one. The Eighth Circuit cavils with, distinguishes and disputes the non-Indian claimants' expert testimony on accretion, and grants no weight whatever to the District Court's findings of accretion. It was the District Court, of course, that heard and saw the expert witnesses and rendered a thorough, reasoned opinion. The Court of Appeals merely reviewed the "cold record" and picked and chose from the evidence what is desired. Such a novel method of review conflicts with the standard set by the Ninth Circuit, which has held that once there exists "substantial and valid evidence" to enable the trier of fact to conclude accretion has occurred, the issue is not available in the Court of Appeals unless clearly erroneous. *Beaver v. United States,*

350 F.2d 4, 7 (9th Cir., 1965). Further, the Eighth Circuit, by its construction and treatment of the burden of persuasion and of the evidence, seems to require absolute proof of the non-Indian claimants' theory of accretion when all that has ever been required in river cases is ". . . [a] degree of certainty that is reasonable as a practical matter, having regard to the circumstances . . ." *Arkansas v. Tennessee,* 269 U.S. 152, 157 (1925).

Finally the Eighth Circuit entirely ignores in its considerations an important presumption in Iowa's favor. Dominion over navigable waters and the soils under them

> ". . . [is] so identified with the sovereign power of government that a presumption against [its] separation from sovereignty must be indulged . . . ." *United States v. Oregon,* 295 U.S. 1, 14 (1934).

Moreover, requiring Iowa to prove ownership of river lands lying east of the present main channel of the Missouri River, lands prima facie sovereign, based on a shift in the burden of proof created by applying a federal statute contravenes ". . . an unbroken line of cases which make it clear that the title acquired by the State [to lands underlying navigable waters by virtue of the Equal-Footing Doctrine] is absolute so far as any *federal principle of land title* is concerned." *Corvallis, supra,* 429 U.S. at 374. (Emphasis supplied.) These federal principles of land title to which Iowa's sovereign title were subjected are inconsistent with the Equal-Footing Doctrine.

Further, the Court of Appeals' creation of an almost concededly insurmountable burden of proof upon the State of Iowa, ignores the ". . . absolute title of the States to the

beds navigable waters . . . ," *id.,* and the presumption created by the Equal-Footing Doctrine against a separation of such title from the sovereign. *United States v. Oregon, supra,* 295 U.S. 1 at 14. Thus, the Court of Appeals' treatment of the evidence is inconsistent with the Equal-Footing Doctrine.

Another aspect of the Equal-Footing Doctrine is the right of the sovereign to have cases concerning title to sovereign lands adjudicated in accordance with and subject to the laws of the sovereign. *Corvallis, supra,* 429 U.S. at 378. This is clearly an incident of the State's sovereignty, *Bonelli Cattle Co., supra,* 414 U.S. at 323 (*Stewart, J.,* dissenting). By shifting the burden of persuasion and by treating the presumption in favor of the Indians as effectively conclusive, the Court of Appeals deprived Iowa of the sovereign right to have its title adjudged in accordance with the laws of Iowa. Thus, the effect of the Eighth Circuit's ruling is inconsistent with the Tenth Amendment preserving such powers in the States.

If allowed to stand, the Eighth Circuit's decision will in untold instances affect the States' constitutional title to lands underlying navigable waters within their boundaries provided by the Equal-Footing Doctrine. It will also cast serious doubt upon the rule laid down first in *Pollard's Lessee v. Hagan,* and most recently in *Corvallis* that such title is absolute insofar as any federal principles of land title are concerned. *Corvallis, supra,* 429 U.S. at 374-377. In so doing, such ruling will in great measure vitiate the Tenth Amendment to the Constitution and the Equal-Footing Doctrine.

CONCLUSION

Amicus respectfully submits that this is an exceedingly important case to the States of the Union because of its implications for essential elements of the States' sovereignty—their right to apply their own laws of land title to lands within their boundaries, and their constitutional title to lands underlying navigable waters held in trust for all citizens of their States. Because of conflicts with long-standing principles of constitutional law announced by this Court and by other Courts of Appeal, and because of the importance of the issues of this case, amicus respectfully requests that the writ of certiorari, prayed for by Iowa, be granted.

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In The

Supreme Court of the United States

October Term, 1978

NO. 78-161

STATE OF IOWA, STATE CONSERVATION COMMISSION of the STATE OF IOWA,
Petitioners,

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R. G. P. INCORPORATED, DARREL L., HAROLD, HAROLD M. AND LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON AND TRAVELERS, INSURANCE COMPANY,
Respondents (Petitioners on Separate Petitions),

vs.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA,
Respondents.

Brief for Amici Curiae in Support of the State of Iowa's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

States of Indiana, Alaska, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Utah, Washington, West Virginia, Wisconsin and Wyoming

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AUTHORITY TO FILE AMICI CURIAE BRIEF

The States of Indiana, Alaska, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Carolina, North Dakota,

Ohio, Oregon, South Carolina, South Dakota, Utah, Washington, West Virginia, Wisconsin and Wyoming, through their Attorneys General, respectfully submit this joint brief as amici curiae under the authority of Rule 42 (4), United States Supreme Court Rules. It is in support of the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit filed by the State of Iowa and the State Conservation Commission of the State of Iowa.

—o—

INTEREST OF AMICI CURIAE

The State of Iowa claims sovereign ownership and jurisdiction over the bed and bank of the Missouri River to the ordinary high water mark on the portion of that river which forms the boundary of Iowa. This Court recently affirmed the principle of such sovereignty in *Oregon v. Corvallis Sand and Gravel Co.*, 429 U. S. 363, 370 (1977) holding,

> . . . Although Federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law.

In the present case, the Eighth Circuit has divested a state of sovereign title to riparian land by operation of what is stated to be the federal common law of accretion and avulsion.

Moreover, the Eighth Circuit utilized a facially discriminatory statute, 25 U. S. C. § 194, to cast the burden of proof upon a "white person" which included the State

of Iowa. This application of law threatens all states subject to Indian land claims which, due to the Eighth Circuit's interpretation of Indian rights, includes every state in the union.

—o—

BRIEF OF THE AMICI CURIAE

QUESTIONS PRESENTED

1. Whether a state may be classified as a "white person" and the United States and an Indian tribe as "an Indian" within the purview of 25 U. S. C. § 194.

2. Whether 25 U. S. C. § 194 is facially unconstitutional under the due process clause of the Fifth Amendment to the Constitution of the United States.

3. Whether a state may be divested of land title by operation of federal common law.

4. If federal law is applicable to this land, did the Eighth Circuit correctly interpret and apply the federal common law of accretion and avulsion.

—o—

SUPPLEMENTARY STATEMENT OF THE CASE

That *amici* adopt the statement as set forth in the State of Iowa's petition.

REASONS FOR GRANTING THE WRIT

I.

The writ should be granted to allow the Court to correct the erroneous holding that a state is a "White Person" and that the United States and the Omaha Indian Tribe are "An Indian" in applying 25 U. S. C. § 194.

25 U. S. C. § 194 states:

> In all trials about the right of property in which *an Indian* may be a party on one side, and *a white person* on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. (Emphasis supplied.)

In applying this statute to the facts of this case, the Eighth Circuit has cast the burden of proof upon a state and one of its agencies by designating them as a "white person" within the meaning of § 194. The Petitioner State of Iowa and its agency should not be so classified.

In labeling a state as a "white person", the Eighth Circuit erred in several respects. First, a reading of "person" to include states violates the plain meaning of the word. See *South Carolina v. Katzenbach,* 383 U. S. 301, 323 (1966), which held that a state is not a "person" under the Due Process clause of the Fifth Amendment. In addition, states have never been held to be "persons" under the Civil Rights Act of 1871, 42 U. S. C. § 1983. *Fitzpatrick v. Bitzer,* 427 U. S. 445, 452 (1976). Second, in *United States v. Perryman,* 100 U. S. 235, 237 (1880), this Court held, in the face of an argument that the words

"white person", as used in the 1834 Indian Non-Intercourse Act, Act of June 30, 1834, 4 Stat. 733 meant "non-Indian", that that term means only the white race and does not mean any race other than Indian. Thus, the mixture of races in the state's citizenry precludes the Eighth Circuit's application of this statute. Section 22 of that 1834 Act contains the language that is now 25 U. S. C. § 194.

Third, prior statutes, which date back to 1796, show that the section was not intended to apply to the present facts. As indicated above, the language of § 194 comes from Section 22 of the 1834 Indian Non-Intercourse Act, which was a modification and extension of the 1822 Indian Non-Intercourse Act, Act of May 6, 1822, 3 Stat. 682. The § 194 language in the 1822 Act used "Indians" in plural form. The 1834 Act changed "Indians" to "an Indian", which is the present form of § 194.

Fourth, the language of other sections of the 1834 Act demonstrates a deliberate effort of Congress to apply § 194 only in cases involving land problems of *individual* Indians. Thus, Section 11 of that Act states in relevant part:

> That if any person shall make a settlement on the lands belonging, secured or granted by treaty with the United States to any Indian *tribe,* or shall survey or shall attempt to survey such lands, or designate any of the boundaries by marking trees or otherwise, such offender shall forfeit and pay the sum of one thousand dollars. (Emphasis supplied.)

Section 12 of the 1834 Act provides, in part:

> That no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any

> Indian *nation* or *tribe of Indians*, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. (Emphasis supplied.)

Section 12 in the 1834 Act also amended the 1802 language of the Indian Non-Intercourse Act, Act of March 30, 1802, 2 Stat. 141, which made any conveyance of land "from *any Indian or nation or tribe of Indians* invalid, unless conveyed by treaty or convention". The 1834 Act dropped the word "Indian" from that sentence to read "any nation or tribe of Indians," thus carefully clarifying the distinction between land owned by a tribe and land owned by an individual Indian.

Fifth, Sections 4, 7 and 8 of the 1834 Act show additional Congressional intent as to the meaning of the terms "an Indian" and "a white person" in Section 22 of that Act. All contain penalties against "any person other than an Indian", showing that Congress knew how to make such a general classification if it chose to do so and thus that "white person" is a specific racial classification referring to a white individual. It further shows that the words "an Indian" in Section 22 of the 1834 Act refer to an individual person.

The *amici* states support the State of Iowa in its Petition to correct the Eighth Circuit's use of 25 U. S. C. § 194 which threatens any state subject to Indian tribal claims. Footnote 1 of the *amicus curiae* brief filed in this case by the American Land Title Association cites a representative, but not all-inclusive list of the pending litigation involving Indian land claims. That list will grow rapidly with great hardship to the states and individuals involved if this decision is allowed to stand.

II.

The writ should be granted to review 25 U. S. C. § 194 which is facially unconstitutional under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

It is obvious from the plain wording of § 194 and our arguments above that the statute discriminates in favor of the Indian race by casting the burden of proof upon the white race in all litigation involving right to property, contrary to the practice in virtually all cases and jurisdiction. Except under this statute, the burden is always upon the *plaintiff*. But here the burden is determined only by the color of one's skin. In reviewing such a racial distinction, this Court stated in *Loving v. Virginia*, 388 U. S. 1, 11 (1967):

> "Over the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' *Hirabayashi v. United States*, 320 U. S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny,' *Korematsu v. United States*, 323 U. S. 214, 216 (1944), and, *if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.*" *Loving v. Virginia*, 388 U. S. 1, 11, 87 S. Ct. 1817, 1823, 18 L. Ed. 2d 1010, 1017 (1967). (Emphasis supplied.)

The Eighth Circuit has failed to demonstrate that the discrimination of § 194 is "necessary" to the accomplishment of a permissible legislative objective. Its reliance

upon *Morton v. Mancari,* 417 U. S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974) is misplaced. In *Regents of the University of California v. Bakke,* — U. S. —, 98 S. Ct. 2773 (1978) this Court discussed *Morton v. Mancari* as follows:

> "Petitioner also cites our decision in *Morton v. Mancari,* 417 U. S. 535 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari,* we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of BIA is *sui generis. Id.,* at 554. Indeed, we found that the preference was not racial at all, but 'an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to groups [,] . . . whose lives are governed by the BIA in a unique fashion.'"

In *Mancari,* this Court said at page 554:

> Here the preference is reasonably and directly related to a legitimate, non-racially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.

Section 194 has no "non-racially based goal". The Eighth Circuit acknowledged that the statute was premised on a policy of preferential, protectionist treatment of Indians. 575 F. 2d 632. In footnote 20 on page 632 a citation is made to a 1924 U. S. Attorney General's Opinion, 34 Op. Attorney General 439 (1925), which discusses this policy. The first sentence states that "from the beginning of *its* negotiations with the Indians, *the Government* has adopted a policy of giving them the benefit of the doubt . . .", and the last sentence concludes "Treaties

have been considered, not according to their technical meaning, but in the sense in which they would be naturally understood by the Indians."

Iowa's situation is quite unlike that described. It involves the United States and the Omaha Tribe, capably represented by their lawyers, asserting a claim to property also claimed by individuals, a corporation and the State of Iowa, also capably represented. The basis for the preferential treatment of Indians is lacking. This is not a case involving interpretation of a vague treaty which could have been worded to take property from the Indian. Title to this land will be determined (and was) by the application of legal principles of accretion and avulsion, not by interpreting the terms of the 1854 Treaty, 40 Stat. 1043. The historic basis for preferential treatment is no longer present and any "necessity" so critical to the validity of this facially discriminatory state has disappeared.

The concern of the *amici* should be apparent. If allowed to stand, the Eighth Circuit's decision designates the state "a white person" and then casts the burden of proof upon that state to prove good title to land. A state is not a "person" for purposes of direct application of Fifth Amendment protection of property rights but as held in *South Carolina v. Katzenbach,* 383 U. S. 301, 323-24 (1966):

> The word "person" in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union. . . . [However] objections to the Act which are raised under these provisions may be considered . . . as additional aspects

> of the basic question presented by the case: Has Congress exercised its powers . . . in an appropriate manner with relation to the States?

Often a state may have no *record* title to its land, and never to its sovereign land. Now, in the Eighth Circuit, all statutory presumptions of record title are lost and race determines who has the burden when an Indian claims the land. No land in the United States is immune from such a challenge since it was all "possessed", or is now claimed to have been possessed, by an Indian tribe or tribes at one time or another. Indian Land Cessions in the United States, 18th Annual Report, Bureau of American Ethnology, Part 2 (1899). Indeed, as this court has held, *United States v. Santa Fe Railroad,* 314 U. S. 345 (1941); *Johnson v. McIntosh,* 21 U. S. 543 (1823); *Cherokee Nation v. Georgia,* 30 U. S. 1 (1831); *The Oneida Indian Nation v. County of Oneida,* 414 U. S. 661 (1974), aboriginal title is a possessory right and if the Eighth Circuit's decision herein is allowed to stand, any Indian tribe held to have aboriginal title under the Indian Claims Commission Act, Act of August 12, 1946, 60 Stat. 1049 (1946) would have possession under § 194. The results can be unimaginably far reaching.

III.

The writ should be granted to correct the erroneous holding of the Eighth Circuit that federal, not state, law of accretion and avulsion is applicable to this case.

In its decision, the Eighth Circuit recognized the basic rule that the laws of the states determine the ownership of riparian land, citing to *Oregon v. Corvallis Sand and*

Gravel Co., supra. But the court found an exception, or what it characterized as a "caveat", 575 F. 2d 620, 628, citing to *Corvallis,* at 375:

> If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between states, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary.

Thus, to support its determination that federal, rather than state, law was applicable, the Eighth Circuit concluded that this case involved a claimed change in the interstate boundary between Iowa and Nebraska as a necessary consequence of a claimed change in the boundary of the reservation. That conclusion was erroneous. In 1943, Nebraska and Iowa entered into a boundary compact which was ratified by Congress in Act of July 12, 1943, 57 Stat. 494 (1943). That compact set the boundary line between the states at the line in "the middle of the main channel of the Missouri River," defined as the "center line of the proposed stabilized channel of the Missouri River as established by the United States engineer's office . . ." *Nebraska v. Iowa,* 406 U. S. 117, 118 (1972).

By this compact, the boundary between the states was set upon the metes and bounds description of that center line and recognized by Congress. The determination and resolution of the issues of this case will determine title to land, but it will not alter the boundary between the two states. The Eighth Circuit quoted from *Arkansas v. Tennessee,* 246 U. S. 158 (1918), but not as fully as this Court did in *Nebraska v. Iowa, supra* at page 176:

> How the land that emerges on either side of an interstate boundary stream shall be disposed of as between

> public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rule of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them . . . But *these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary from where otherwise it should be located.*" 575 F. 2d 620 at 628. (Eighth Circuit's cite italicized.)

The State of Iowa does not seek to "press back" the interstate boundary. It is her objective, and in the interest of all states appearing as *amicus,* that Iowa be allowed to apply state law to determine title to land that exists within the borders of Iowa. It is crucial that this Court examine the Eighth Circuit's radical departure from general principles of river law and prevent undue confusion which would result from the application of federal law by the federal courts and state law by the state courts in the same geographical area.

The Eighth Circuit's reasoning that federal common law applies because Indian trust land is involved requires consideration also.

In *Oregon v. Corvallis Sand and Gravel Co., supra,* at 370, this court held:

> . . . Although Federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasement by operation of any federal common law.

The Eighth Circuit distinguished this case from that authority by finding that the defendants (petitioners here)

have attempted to extinguish the aboriginal title, which at one time may have been in the Omaha Tribe. 575 F. 2d 620 at 629. It cited to *Oneida Indian Nation v. County of Oneida,* 414 U. S. 661, 677 (1974), and *Confederated Salish & Kootenai Tribes v. Namen,* 380 F. Supp. 452 (D. Mont. 1974), *aff'd,* 534 F. 2d 1376 (9th Cir.), *cert. denied,* 429 U. S. 929 (1976), for support that federal common law applies. In the *Oneida* case, *supra,* land that was once possessed by the Oneida Tribe in the state of New York was ceded to the state without the approval of Congress. This Court held that a federal controversy existed within the requirements of 28 U. S. C. § 1331 and § 1362, and that federal law protects the possessory rights to tribal land. In *Namen, supra,* the defendant built a pier and wharf over a lake which was wholly within an Indian reservation. Again, this Court agreed with the Ninth Circuit that the United States held, as trustee, title to the lake bed and federal common law would determine riparian rights.

This present case is distinguishable from that authority. Here, no claim of adverse possession or illegal transfer of Indian land is involved. The question here is whether the geographic change was a result of accretion or avulsion. The trial court's determination of this fact question was improperly overturned by the Eighth Circuit. The land in question is now situated within the boundaries of the State of Iowa by Act of Congress and Iowa was vested with title to the beds of rivers and streams when admitted to the Union of the United States. Act of December 28, 1846, 9 St. L. 117. In Iowa's case, that was eight years prior to the 1854 Treaty with the Omaha Tribe, 40 Stat. 1043, and 21 years before the Bar-

rett Survey established the eastern boundary of the Omaha Reservation. In the *Oneida* and *Namen* cases mentioned above, there was no question but that Indian land was involved. The courts found that the federal trusteeship of Indian lands required federal law to be applied. The critical difference here is that *this land may not be Indian land* (indeed the trial court found it was not). To apply federal common law on the premise that Indian land is involved is a mistake analogous to the finding of previous Indian possession under 25 U. S. C. § 194. It begs the question by assuming the answer to the issue: Is the land, that now exists within Iowa's boundary, land in place after an avulsion and therefore Indian land or is it land resulting from accretion? The amici states request this Court to determine the applicability of state and federal law under these circumstances.

IV.

The writ should be granted to correct the Eighth Circuit's erroneous interpretation and application of the law of accretion and avulsion, even if the federal common law is applicable.

93 C. J. S. 750, 751, *Waters*, § 76 states:

> In determining whether an addition to land constitutes accretion, the length of time during which it is in the course of formation is not of importance. If it is formed by a gradual, imperceptible deposit of alluvium, it is accretion, but, if the stream changes its course suddenly and in such manner as not to destroy the integrity of the land in controversy and so that the land can be identified, it is not accretion.

The Eighth Circuit's decision rejects this principle of law and the authority of *Nebraska v. Iowa*, 143 U. S. 359 (1892). That case held that the identity of fast land in place is the essential factor in designating a channel change as avulsive rather than accretive and not the speed of the erosion and deposition of the land. The rejection of this reasoning creates a conflict with a long line of cases in this Court, other federal courts and state courts which have followed the holding of *Nebraska v. Iowa*, supra. See *Oklahoma v. Texas*, 260 U. S. 606, 637 (1922); *Louisiana v. Mississippi*, 384 U. S. 24; *Special Masters Report*, pp. 14, 15, 16; *Nebraska v. Iowa*, 406 U. S. 117 (1972); *Bonelli Cattle Co. v. Arizona*, 414 U. S. 313, 326 (1973), (overruled on other grounds, *Oregon v. Corvallis, infra*); *Mississippi v. Arkansas*, 415 U. S. 289, 291 (1974); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977).

See also, *Conkey v. Knudsen*, 143 Neb. 5, 8 N. W. 2d 538 (1943), vacating 141 Neb. 517, 4 N. W. 2d 290 (1942); *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N. W. 647 (1935); *Iowa R. R. Land Co. v. Coulthard*, 96 Neb. 607, 148 N. W. 328 (1914). These and several other state cases—*Yutterman v. Grier*, 112 Ark. 366, 166 S. W. 749, 751 (1914); *Longabaugh v. Johnson*, 321 N. E. 2d 865, 867 (Ind. App. 1975); *Coulthard v. Stevens*, 84 Iowa 241, 50 N. W. 983, 984 (1892); *McCormick v. Miller*, 239 Mo. 463, 144 S. W. 101, 103 (1912); *Attorney General ex rel. Becker v. Bay Boom Wild Rice & Fur Farm*, 172 Wis. 363, 178 N. W. 569, 573 (1920)—which discuss identifiable land in place as one of the key factors in a finding of avulsion, all ultimately rely on either *Nebraska v. Iowa, supra*, or *Benson v. Morrow*, 61

Mo. 345 (1875). The Eighth Circuit reads the *Nebraska v. Iowa* case as an expansion rather than a limitation of the scope of avulsion, 575 F. 2d at 636. Such reasoning, nevertheless, does not allow two totally different concepts to govern in the same situation. Avulsion must be determined either by identifiable land in place or by the speed of the channel change.

The clearest example of the conflict of this decision with prior case law appears in the Special Masters report in *Louisiana v. Mississippi,* 384 U. S. 24 (1966), which asked the question:

> "Can there be an avulsion where the entire change in the channel takes place in the same riverbed, leaving no surface land between the two channels?"

The Master then answered the question in the negative, stating:

> "The Special Master's study of the applicable case law leads to the conclusion that there are but two rules—or rather one long-standing general rule and its exception—which can be applied to river boundary changes. The general rule is that the boundary follows the changes in the main navigable channel. The exception is that when there is a cutoff, natural or artificial, the old bend that has been cut off remains the boundary in that particular area. Louisiana contends that since the cutting of the new deep-water channel was not altogether a gradual process of erosion and accretion, it must be an avulsion.
>
> "This contention is untenable. All case law and all reasoning behind these rules point to the opposite conclusion—that the general rule of the 'live thalweg' is preferable and will be applied in all cases, unless there has been a clear and convincing avulsion. This avulsion must be sudden and perceptible . . . we

> have been unable to find any case, with facts similar to the instant case, in which an avulsion has been found by the Court where the river remains in the same bed of the stream. In all such cases the new channel was formed when the river 'suddenly leaves its old bed and forms a new one. . . .' *Arkansas v. Tennessee,* 246 U. S. 158, 173."

Special Master's Report, p. 17, confirmed, *Louisiana v. Mississippi,* supra (19-6).

The *amici* states ask this Court to correct or reconcile the Eighth Circuit's interpretation of federal law with the prior case law on this issue. If allowed to stand as is, this decision sets legally untenable precedent in cases involving accretive and avulsive changes in navigable streams and rivers, especially when two states are affected.

—o—

CONCLUSION

This is a case of major national significance. This brief is joined by states representing virtually every circuit. The radical departures from traditional concepts governing title to riparian lands, as espoused by the Eighth Circuit, should be reviewed by our highest Court. If these departures prevail, they will have a revolutionary effect on ownership of land throughout the nation.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1978

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No. 78-161

—o—

State of Iowa, State Conservation Commission of the State of Iowa,

Petitioners,

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, R. G. P. Incorporated, Darrell L., Harold, Harold M. and Luea Sorenson, Harold Jackson, Otis Peterson and Travelers Insurance Company,

Respondents (Petitioners on Separate Petitions),

vs.

Omaha Indian Tribe and United States of America,

Respondents.

—o—

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

—o—

PETITIONERS' BRIEF ON THE MERITS

—o—

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PETITIONERS' BRIEF ON THE MERITS

—o—

The above-named petitioners respectfully pray that the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 11, 1978 be reversed, with instructions to affirm the judgment of the United States District Court, Northern District of Iowa.

—o—

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 575 F. 2d 620, appears as Appendix A to the Petition for Certiorari. The findings of fact, conclusions of law and decree of the District Court are reported at 433 F. Supp. 67, and its memorandum opinion is reported at 433 F. Supp. 57. They appear as Appendix B and C to the Petition for Certiorari, respectively.

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JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 11, 1978. A timely petition for rehearing was filed on April 25, 1978 and denied on May 2, 1978. Petition for certiorari was filed within ninety days of that date, and the petition was granted as to issues 1 and 4 on November 13, 1978. This Court's jurisdiction is invoked pursuant to 28 U. S. C. § 1254(1).

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment X.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Code, Title 25.

§ 194. *Trial of right of property; burden of proof.*

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

Derivation: Act of June 30, 1834, C. 161, § 22, 4 Stat. 733.

Other statutory provisions referred to herein as helpful in interpreting § 194 are:

> An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved June 30, 1834, 4 Stat. 729, appearing in the Appendix hereto commencing at page 190.
>
> An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved March 30, 1802, sections 4 and 12, 2 Stat. 139, 141, 143, appearing in Appendix E to the Petition for Certiorari.
>
> An act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers", approved thirtieth of March, one thousand and eight hundred and two, approved May 6, 1822, Section 4, 3 Stat. 682, 683, appearing in Appendix E to the Petition for Certiorari.

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QUESTIONS PRESENTED FOR REVIEW

On November 13, 1978 this Court granted certiorari as to questions 1 and 4 presented in Petition No. 78-161, *Wilson, et al. v. Omaha Indian Tribe, et al.* These issues are:

1. Whether 25 U. S. C. § 194 is applicable in a trial between a sovereign state of the United States and an organized Indian tribe represented by the United States Government.

2. Whether the Court of Appeals' decision violates established principles of Federalism.

—o—

STATEMENT OF THE CASE

This is an action by the United States as trustee for the Omaha Indian Tribe and by the Tribe on its own behalf, to quiet title to approximately 2,900 acres of land lying on the east bank of the Missouri River and entirely within the State of Iowa. App. A2-3[1]. Separate actions were commenced by these plaintiffs in the United States District Court for the Northern District of Iowa, Western Division. App. A5. The United States claimed title to approximately 2,900 acres, which according to the so-called Barrett Survey, was part of the Omaha Indian Reservation in 1867, lying on the west

1 References will be made to the Appendix to the Petition for Certiorari, designated herein as "App. A, B, C, D, E & F", and to an appendix filed with the briefs on the merits, designated herein as "App."

or Nebraska bank of the River. *Id.* The Tribe in its separate lawsuit claimed title to this and approximately 8,000 additional acres in the same locality. *Id.* The defendants counterclaimed seeking to quiet title to the disputed land in themselves, claiming that the land surveyed by Barrett had been washed away after 1867 and replaced by new land on the Iowa side of the River. App. A3.

The two cases were consolidated for trial as to the 2,900 acres and the Trial Court, by Judge Andrew W. Bogue, quieted title to the disputed land in the defendants, including approximately 900 acres of Missouri River bed and island formations therein claimed by the State of Iowa. App. A5, B5, B60; App. 90-93, 152-155.

The Trial Court found, as a matter of fact from the evidence, that the land claimed by the plaintiffs had been destroyed and washed away by the River between 1867 and 1940, and the land in dispute was new and different land, formed by accretion to the Iowa bank of the River. App. B27-29.

The Eighth Circuit reversed and remanded with instructions to enter judgment quieting title to the disputed land[2], in the United States as trustee, and the Omaha Indian Tribe. App. A66-67. The basis for the Court of Appeals decision is a federal statute enacted in 1834 and never applied in any comparable reported case. App. A20-25. It states,

2 The Eighth Circuit used the term "trust lands", thereby excepting approximately 400 acres allotted to individual Indians, which may have been patented to non-Indians.

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.
>
> 25 U.S.C. § 194.

In invoking this statute, the Court of Appeals held, without explanation, that the State of Iowa, which is comprised of citizens of diverse racial extraction, including Indians, Orientals, Mexican-Americans and Blacks, is a "white person", and the Omaha Indian Tribe is "an Indian". It found that the nature of the interests litigated required application of federal, not state, law. App. A13-20. And, aided by a strained interpretation of "federal common law", it reversed the Trial Court's finding of fact that the disputed land had never been in the possession of "an Indian", and that Indian land which had been in the same locality in 1867 had washed away and been destroyed by the River in intervening years. App. A65.

———o———

SUMMARY OF ARGUMENT

1. The term "white person", used in 25 U.S.C. § 194, does not include the State of Iowa. The plain meaning of the words "white person" excludes a sovereign State of the United States, made up of citizens of diverse racial extractions, including Blacks, Orientals and Mexican-Americans, as well as Caucasians and Indians. Moreover, it is inconsistent with this Court's interpretation of the words in other decisions. *United States v. Perryman,* 100 U.S. (10 Otto) 235 (1880); and *South Carolina v. Katzenbach,* 383 U.S. 301, 324 (1966). And a reading of the whole Act from which § 194 was derived shows that "white person" was intended to refer to individual human beings. The word "person" was used repeatedly in other sections where the context makes it clear this was the intended meaning. See Sections 2, 3, 5, 10, 11 and 23, App. 190-200. And when Congress meant "any person other than an Indian", the Act contains that very phrase. Sections 4, 7 and 8, App. 192-193. See also Section 19, App. 197-198. Acts in *pari materia* with 25 U.S.C. 194 verify the plain meaning of "white person". See, for example, 25 U.S.C. § 264. See also 1 U.S.C. 1.

The Eighth Circuit's interpretation of the words "white person" to include the State of Iowa strains reasonable interpretation of the words used, and raises serious problems of federalism and comity.

In addition, the term "Indian" in 25 U.S.C. 194 does not mean an organized tribe of Indians, represented by the United States Government as trustee. Legislative history of the section shows that the word "Indian" was was used advisedly in the singular. The predecessor to this section first appeared in an 1822 amendment to the 1802 Act to regulate trade and intercourse with the Indian tribes, etc., and the term "Indians" was used. App. E2. In 1834 the term "Indians" was changed to "Indian", in the singular, making it clear the statute was meant to apply to individual Indians, and not groups or tribes of Indians. App. E2-4. Other 1834 amendments to the same legislation verify this. Section 12 of the original

legislation provided conveyances of land from "any Indian, or nation, or tribe of Indians" were invalid unless made by treaty or convention. App. E2. The 1834 amendment deleted the word "Indian", in the singular, making Section 12 applicable to "any Indian nation or tribe of Indians", but not to individual Indians. App. E3. It follows from this that the 1834 amendments confined the protection of Section 12 to Indian tribes, and the protection of the present 25 U. S. C. 194 to individual Indians. Any other interpretation would nullify the manifest intent of Congress when it amended the section.

The Court of Appeals' opinion, if followed, may result in allocation of the burden of proof upon any State of the United States, or the Federal Government itself, in property disputes with Indians. This is certainly not required by 25 U. S. C. § 194. It would create havoc to property laws effecting untold millions of acres of land, which, prior to the Court of Appeals decision, was administered fairly and effectively, for Indians and non-Indians alike, without application of this anomalous statute.

2. In addition to improperly applying 25 U. S. C. § 194 to the facts of this case, and casting the burden on the State of Iowa to prove events which occurred on the Missouri River long before living memory, the Eighth Circuit fashioned "federal common law" drastically different from local property law, and from previously recognized federal law. On this basis it reversed the Trial Court's findings of fact, arrived at without any evidentiary presumption, and remanded the case with instructions to enter judgment for the United States as trustee, and the Omaha Indian Tribe. App. A66-67.

The Eighth Circuits application of federal common law was based upon two erroneous conclusions: 1. that this case involves an interstate boundary, and 2. the relationship between the United States as trustee and the Omaha Indian Tribe and the nature of the interest litigated required it. App. A13-15.

This case does not involve an interstate boundary. That was fixed by the Iowa-Nebraska Boundary Compact of 1943. Code of Iowa, 1977, p. lxxiv. However, the Eighth Circuit held that it was nevertheless necessary to locate the boundary prior to 1943 because Section 3 of the Compact requires the two States to recognize titles to ceded land which were good in the ceding state prior to the Compact. App. A15. This was incorrect for two reasons: This Court expressly held in *Nebraska v. Iowa*, 406 U. S. 117, 122-3 (1972) that it is not necessary to locate the boundary as it existed before the compact. It is enough to show a title good in *either* state prior to the compact date. And locating the boundary as it was before 1943 would not have aided the plaintiffs in any event. It could only have effected the Trial Court's choice of applying Nebraska law or Iowa law, and the Trial Court resolved the issue in favor of the plaintiffs when it applied Nebraska law, and denied the State of Iowa and the other defendants in this case the Iowa presumption of accretion, as opposed to avulsion, and the Iowa common law that the State owns the bed of navigable streams within its boundaries. App. C16. Consequently, there is no foundation for the Court of Appeals' conclusion that this case involves the location of an interstate boundary.

The Eighth Circuit also erred in its conclusion that the relationship of the United States as trustee to the Omaha Indian Tribe and the "nature of the interest litigated" required application of federal common law. App. A15. It has long been recognized that the Tenth Amendment mandates application of state law unless federal law otherwise requires. *Erie R. Co. v. Tompkins,* 304 U. S. 64 (1939). The rule is no different in cases involving Indians. *(Oklahoma v. Texas,* 258 U. S. 574 (1922).

When Iowa was admitted to the Union in 1846, its western boundary was fixed at the middle of the main channel of the Missouri River. Code of Iowa, 1977, p. xxxix. At the same time it acquired sovereignty and ownership of the bed of the River within its boundaries. *Pollard's Lessee v. Hagen,* 3 How. 212 (1845); and *Payne v. Hall,* 192 Iowa 780, 185 N. W. 912 (1921). Later reservation of land to the Omaha Indian Tribe, in 1854, *west* of the River, could not operate to defeat or diminish the prior grant to the State of Iowa. *Oregon v. Corvallis Sand and Gravel Co.,* 429 U. S. 363 (1977).

No coherent reason has been advanced why the property rights here in issue cannot be adequately protected by application of local law, as opposed to "federal common law". There is no claim that local law is not uniform in its application, or that it will affect the property rights of the Omaha Indian Tribe any differently than the property rights of others. But the Eighth Circuit, by liberally extrapolating from two court of appeals decisions[3], fashioned "federal common law" which neatly ac-

3 *Veach v. White,* 23 F. 2d 69 (9th Cir. 1927); and *Uhlhorn v. U. S. Gypsum Co.,* 366 F. 2d 211 (8th Cir. 1966).

commodates the plaintiffs' theory of the case, but is drastically at variance with local law as well as previously recognized federal law concerning accretion and avulsion.[4] If allowed to stand, it will constitute one scheme of property rights for Indians, side by side with a different scheme for others, all within the boundaries of the sovereign State of Iowa. And, as it pertains to Iowa's ownership of the bed of the Missouri River within its boundaries, the Eighth Circuit's ruling is clearly inconsistent with this Court's holding in *Oregon v. Corvallis Sand and Gravel Co.,* 429 U. S. 363 (1977).

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ARGUMENT

I.

25 U. S. C. § 194 is not applicable in a trial between a sovereign state of the United States and an organized Indian tribe represented by the United States government.

The statute here in issue, 25 U. S. C. § 194, states:

In all trials about the right of property in which *an Indian* may be a party on one side, and *a white*

4 Compare the Eighth Circuit's holding that "a sudden and unusual jump in the thalweg within the bed of a stream or over, as well as around, land (submerged or not) invokes the doctrine of avulsion . . .", App. A38-39, with *Nebraska v. Iowa,* 143 U. S. 359 (1892); *Kitteridge v. Ritter,* 172 Iowa 55, 151 N. W. 1097 (1915); *Wilcox v. Pinney,* 250 Iowa 1378, 98 N. W. 2d 270 (1959); *Kinkead v. Turgeon,* 74 Neb. 573, 109 N. W. 744 (1906); *DeLong v. Olsen,* 63 Neb. 327, 88 N. W. 512 (1901); and *Gill v. Lydick,* 40 Neb. 508, 59 N. W. 104 (1894).

> *person* on the other, the burden of proof shall rest upon *the white person,* whenever *the Indian* shall make out a presumption of title in himself from the fact of previous possession or ownership. (Emphasis added.)

The Court of Appeals' interpretation of the term "white person" to include the sovereign state of Iowa is erroneous.

Statutory language, the obvious starting point for statutory interpretation, is to be read in its ordinary and natural sense. Person, in that sense, means "(a)n individual human being; a man, woman, or child." 7 Oxford English Dictionary 724 (1933). In common usage that term does not include states and, ordinarily, statutes employing the term will not be construed to do so. This is clear today, *e. g., United States v. United Mine Workers of America,* 330 U. S. 258, 275 (1947); *United States v. Cooper Corporation,* 312 U. S. 600, 605 (1941); *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.,* 224 U. S. 152 (1912); 1 U. S. C. § 1, and it was clear at the time of the original enactment of the section in issue here, *e. g., Levy v. McCartee,* 31 U. S. (6 Pet.) 102, 110 (1832); *United States v. Knight,* 39 U. S. (14 Peters) 301, 315 (1840); *Dollar Savings Bank v. United States,* 86 U. S. (19 Wallace), 227, 239 (1873); *United States v. Greene,* 26 Fed. Cas. 33 (C. C. D. Maine 1827) (No. 15,258) (Story, Circuit Judge); *In re Fox,* 52 N. Y. 530, 11 Am. Rep. 751, 754-55 (1873), *aff'd., United States v. Fox,* 94 U. S. 315 (1876); *Commonwealth v. Baldwin,* 26 Am. Dec. 33, 34 (Penn. 1872). Reading the further qualified "white person" to include the sovereign states of the United States widens the gap between the Congressional

choice of words and the interpretation placed upon them. See *United States v. Perryman,* 100 U. S. (10 Otto) 235 (1880). That is certainly a reading of the statute which its terms will not bear.

That the words "white person" were not meant to include the states is strengthened by a reading of the whole Act. The statutory section in issue herein, 25 U. S. C. § 194, was originally enacted as section 22 of Act of June 30, 1834, C. 161, 4 Stat. 733. A. 199. For the entire 1834 Act see A. 191-204. In that Act, the words "white person" also appear in section 16 which provides for compensation to Indian victims when a white person is convicted of a crime within Indian country and the crime damaged an Indian's property. As this court has held, *United States v. Perryman, supra,* in this section of the same Act, these same words clearly do not include the states.

The word person by itself appears in a number of sections of the 1834 Act. Person is used in provisions regulating those who shall be permitted to trade with Indians. They cannot be of bad character, section 3, and they must be licensed and bonded, section 2, and citizens of the United States, section 5. The word is used in connection with the apprehension and removal of persons unlawfully in Indian country. Sections 10, 11 and 23. The word is employed over and over in the original Act in ways which demonstrate a Congressional intent that it designate individual human beings. More recent additions to this chapter confirm this meaning by making it a crime "for any person to induce any Indian" to convey lands except by lease or contract authorized by law

to be made. 25 U. S. C. § 202 (enacted June 25, 1910). Use of the word to designate those criminally liable obviously is exclusive of the states.

Additionally, where Congress meant "any person other than an Indian", the Act contains that very phrase. Sections 4, 7 and 8. Where the Act means both "all Indians" and "all other persons", it says so. Section 19. The Act in its entirety corroborates the considered use of the word person to designate individual human beings and, in the section in question herein, the careful use of the term white person to designate individual Caucasions. The Act in its entirety demonstrates the precision with which Congress spoke. See *United States v. Perryman,* 100 U. S. (10 Otto) 235 (1880). See generally, *Pennington v. Coxe,* 6 U. S. (2 Cranch) 16, 27 (1804) (Marshall, C. J.).

Acts *in pari materia* reinforce this plain meaning of the term "white person". See, for example, 25 U. S. C. § 264, which deals with the employment of white persons by Indian traders. Even the general definition section for the whole of the United States Code, section 1 of Title 1, while providing that the word "person" includes a variety of specified forms of organizations, as well as individuals, does not include states in the definition.

In addition to all of the above, it is not consistent with this Court's decisions in other contexts to read the word "person", *e. g., South Carolina v. Katzenbach,* 383 U. S. 301, 324 (1966), or the term "white person", *United States v. Perryman, supra,* to include the states. *Cf. United States v. Oregon,* 295 U. S. 1, 14 (1935) ("Dominion over navigable waters and property in the soil under

them are so identified with the sovereign power of government that a presumption against their separation must be indulged . . .").

Any other construction of the statute, in addition to straining reasonable interpretation of the words used, raises serious federalism (and comity) problems. Federal interference with a state's land titles certainly treads on ground essential to the sovereignty of the state, see *National League of Cities v. Usery,* 426 U. S. 833 (1976), and for that additional reason such an interpretation should be avoided, *Ashwander v. TVA,* 297 U. S. 288, 246-48 (1936) (Brandeis, J. concurring).

This statutory reference to white persons should not be construed to include the sovereign states. Such a conclusion is reversible error. Such a conclusion strains reasonable interpretation of the words used. Such an interpretation is inconsistent with the use of the term in other sections of the Act and in other Acts *in pari materia.* Such an interpretation is not consistent with this Court's interpretation of the words in other contexts. Such an interpretation raises serious problems of federalism and comity. And, as appears more fully below, such an interpretation runs contrary to the apparent purpose of the Act.

The Circuit Court of Appeals also incorrectly interpreted the word "Indian" as used in that same section, 25 U. S. C. § 194. This section applied to individual Indians, and not to tribes of Indians. The history of the legislation shows that the term "Indian" was used advisedly in the singular. The predecessor to 25 U. S. C. § 194 first appeared in an 1822 act to regulate trade and

intercourse with the Indian tribes, and the plural word "Indians" was used. In 1834, the term was changed to the singular "Indian", making it clear that the statute now was intended to be applied to individual Indians, and not to groups of Indians.[5]

This is further verified from the fact that section 12 of the act was also amended in 1834. In its 1802 form, section 12 invalidated any conveyance of land "from any Indian or nation or tribe of Indians," unless conveyed by treaty or convention. In 1834 the words "Indian or" were deleted. Congress has clearly distinguished between land owned by a tribe and land owned by individual Indians. It is evident from this that Congress intended to accord the protection of section 12 to nations or tribes of Indians only, and the protection of section 22 (now 25 U. S. C. § 194) to individual Indians only.

It is clear from all of the above that the land-title-litigation section at issue herein was intended to protect individual Indians who might otherwise be the subject of fraud and overreaching on the part of individual white persons. Congress has protected tribes in other ways, including, in this case, for example, by providing the financing and the manpower for the preparation and presentation of this litigation. The word "Indian" was not intended to apply to a tribe of Indians represented by the United States Government, just as there is no indication of any congressional purpose to protect an Indian from fraud and overreaching on the part of a sovereign state of the United States. Yet this is a necessary implication of the Court of Appeals' ruling.

If followed, the ruling below will result in the application of 25 U. S. C. § 194 in property disputes involving individual Indians or Indian tribes against any state of the United States and, it would seem, the Federal Government itself. The burden of proof in these sorts of cases being particularly crucial, see *Lavine v. Milne*, 424 U. S. 577, 585 (1976), such a ruling easily could result in the divestiture of countless acres of State and Federal land. It would certainly create a great deal of confusion regarding title to vast areas of land. These clearly are steps which should not be taken by the judiciary.[6]

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5 Section 1 of Title 1 of the United States Code, the modern definitional section for the entire code, states that "words importing the singular include and apply to several persons, parties, or things," but only "unless the context indicates otherwise." The context of the use of the singular "Indian", as described in the text above, indicates that it is not to be read in the plural. In any event, reading Indian in the plural, particularly in the context described above, would expand its meaning quantitatively, that is, to include several individual Indians. It would not expand its meaning qualitatively, that is, to include an Indian tribe.

6 "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union . . . (However) objections to the Act which are raised under these provisions may be considered . . . as additional aspects of the basic question presented by the case: Has Congress exercised its powers . . . in an appropriate manner with relation to the States?"

South Carolina v. Katzenbach, 383 U. S. 301, 323-24 (1966). As a final and untenable irony of the opinion below, while the State of Iowa is not a "person" for purposes of direct application of Fifth Amendment protection of property rights, ed., it was considered a "white person" for purposes of divesting it of its property.

II.

The Court of Appeals decision violates established principles of federalism.

So far as any living person is concerned, and until the Court of Appeals' decision, the Omaha Indian Reservation has always been located on the west bank of the Missouri River in the State of Nebraska, and the land here in issue has always been on the east bank of the River, entirely within the State of Iowa. The Trial Court found, without the aid of any evidentiary presumption, that land which, according to the so-called Barrett Survey, was part of the Omaha Indian Reservation in 1867 had washed away and been destroyed during intervening years, and the disputed land now in the same locality in the State of Iowa was new land, formed by accretion to the Iowa bank of the River. The Court of Appeals' reversal of the Trial Court's findings of fact and conclusions of law violated established principles of federalism. It invoked 25 U. S. C. § 194, which by its terms is inapplicable to the facts of this case.[7] It incorrectly held that

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7 The foundational fact which must be proven before § 194 can be invoked is that the Indian had "previous possession or ownership" of the disputed property. This was the ultimate issue to be decided in the case at bar. And the trial court found, on the basis of the evidence presented, without the aid of any presumption, that the land was never in the possession of the Omaha Indian Tribe, but on the contrary, was land formed on the Iowa bank of the River between 1867 and 1940, many years after Indian land in the same locality was washed away and destroyed by the River. App. B49-50.

(Continued on next page)

"federal common law" is applicable to this case because (1) the case concerns an interstate boundary, albeit now superceded by a boundary compact, and (2) the special relationship between the United States and the Omaha Indian Tribe and the nature of the interest litigated required it.

Contrary to the Eighth Circuit's opinion, this case does not concern an interstate boundary. The boundary between Iowa and Nebraska was established in 1943 by the Iowa-Nebraska Boundary Compact. Code of Iowa, 1977, p. lxxiv; 1943 Iowa Acts ch. 306; 1943 Nebraska Laws ch. 130; 57 Stat. 494 (1943). This litigation could not possibly affect the boundary between Iowa and Nebraska as it presently exists.

However, the Court of Appeals continued:

> * * * To apply the compact it is nevertheless necessary to establish title good in one state or the other as of 1943. Iowa-Nebraska Boundary Compact § 3. *Good title in a state prior to 1943 in turn depends upon the location of the thalweg of the Missouri River*, a determination which would have been controlled by a federal law. * * * (Emphasis added.)

App. A15.

(Continued from previous page)

The Eighth Circuit, however, invoked § 194 upon the foundational fact that the 1867 Barrett survey showed a portion of the Omaha Indian Reservation, on the Nebraska bank of the River, occupied the disputed area *at the time of the survey*. App. A21-22. Then the Court of Appeals, applying § 194, cast the burden of proof on the State of Iowa, and reversed the trial court's contrary finding of fact. Thus, it applied § 194 in the absence of the "fact of previous possession or ownership"; and it utilized the authority of the statute to find the fact which was requisite to the statute's Application. This involuted reasoning circumvents any recognized judicial fact finding process.

This statement is clearly erroneous. This Court, by Mr. Justice Brennan, held, in *Nebraska v. Iowa,* 406 U. S. 117 (1972):

> (this)[8] construction would require the claimant who proves title "good in Nebraska" also to shoulder the burden of proving the location of the original boundary before 1943, as well as proving that the lands were on the Nebraska side of that boundary. That, said the Special Master, and we agree, "would be placing a burden upon the land owner which the states themselves refused to undertake in 1943 and agreed would not be necessary. The states would in effect be saying to the land owners, 'we could not prove where the boundary was in 1943 but now, after we have waited 27 years, we are going to make you prove where it was at your own expense even though we know it is impossible.' " (Emphasis in the original.)

Id. at 122-3.

The pre-1943 location of the thalweg and the Iowa-Nebraska boundary is irrelevant to this litigation for the additional reason that the Trial Court's choice of law, as between Iowa and Nebraska, favored the plaintiffs. The Trial Court reasoned that the plaintiffs were entitled to prove title good in Nebraska under the authority of the Iowa-Nebraska Boundary Compact, *supra,* and this Court's decision in *Iowa v. Nebraska,* 406 U. S. 117 (1972), *supra.* App. C3-8. In so holding it denied the defendants the Iowa presumption in favor of accretion, as opposed to avulsion, and the Iowa doctrine of State

8 The Court was referring to the State of Iowa's contention that an adverse claimant alleging a title good in Nebraska prior to 1943 must prove the land was located in Nebraska in 1943.

ownership of the bed and islands of navigable streams within its borders. App. C15-6[9].

It follows that this litigation concerns neither the boundary as it presently exists, nor the boundary as it existed prior to 1943. Moreover, any issue which would have aided the plaintiffs by locating the boundary as it existed at any time prior to 1943 was resolved in their favor when the Trial Court applied Nebraska law instead of Iowa law in determining the riparian rights of the parties. The fact that there is an interstate boundary in the locality does not supply any basis for application of federal law.

As for the Court of Appeals' holding that the relationship between the United States and the Omaha Indian Tribe, and the nature of the interest litigated, require application of federal common law, it has long been recognized that the Tenth Amendment mandates application of state law unless federal law otherwise requires. The classic expression of this settled doctrine is found in *Erie R. Co. v. Tompkins,* 304 U. S. 64 (1939). This Court said,

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. * * * There is no federal general common law. Congress has no power to declare substantive rules of common law appli-

9 However, Iowa's ownership of the bed of the River and islands formed therein within its boundaries after 1943 cannot be disputed. *Nebraska v. Iowa,* 406 U. S. 117, 125 (1972), quoting with approval *Tyson v. Iowa,* 283 F. 2d 802 (CA 8 1960). See also *St. Louis v. Rutz,* 138 U. S. 226, 250 (1891); and *Oregon v. Corvallis Sand and Gravel Co.,* 429 U. S. 363, 368-370 (1977).

> cable in a state whether they be local in their nature or "general", be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Id. at p. 78.

The rule is no different in cases involving Indians. The polestar issue remains: Do federal interests require the application of federal law? Otherwise, the law of the state where the land is located controls. *Oklahoma v. Texas,* 258 U.S. 574 (1922). This court held,

> * * * If by a treaty or statute or the terms of the federal government's patent it has shown that it intended to restrict the conveyance . . . that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the State in which the land lies. Where it is disposing of tribal land of Indians under guardianship the same rules apply.

Id. at pp. 594-595. See also *United States v. Oklahoma Gas Co.,* 318 U.S. 206 (1943); *Francis v. Francis,* 203 U.S. 233 (1906); and *Herron v. Choctaw & Chicasaw Nations,* 228 F. 2d 830 (10th Cir. 1956).

There can be no dispute that the State of Iowa was admitted to the Union in 1846, that its western boundary was the middle of the main channel of the Missouri River, that it was admitted on an equal footing with the original thirteen states, and it then acquired sovereignty and ownership over the bed and banks of the Missouri River east of that boundary. Code of Iowa, 1977, p. xxxix; *Pollard's Lessee v. Hagan,* 3 How. 212 (1845); *Payne*

v. Hall, 192 Iowa 780, 185 N. W. 912 (1921). Reservation of land *west* of the Missouri River eight years later, in 1854, Treaty of March 16, 1854, with the Omaha Indians, 10 Stat. 1043, could not operate to defeat or diminish the prior grant to the State of Iowa. In *Oregon v. Corvallis Sand and Gravel Co.,* 429 U.S. 363, 370 (1977), this Court held,

> . . . Although Federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasement by operation of any federal common law.

The Eighth Circuit, in amplifying upon the "compelling reason" for applying federal law in this case observed that local law is applicable to the incidents of ownership in fee patented land and Indian allotment lands, but "(t)he claims asserted by these defendants attempt to extinguish the aboriginal rights of the Omaha Indian Tribe, guaranteed by treaty, in these lands"[10]. App. A17.

There is no good reason why a distinction should be made between riparian property rights as they relate to Indian land conveyed by patent, and Indian land reserved by treaty. Both are possessory interests in real property. The interest of the Federal Government in protecting its grantees is the same. The need to mesh the property rights conveyed with other property rights

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10 Of course this improvident language anticipates what the "aboriginal rights" of the Omaha Indian Tribe, "guaranteed by treaty" are, and by what law those rights are to be interpreted.

in the locality is the same. And the propriety of subjecting them to local riparian law, subject always to the Federal Government's right and duty to protect its original grant, is the same.

However, the Eighth Circuit attempted to distinguish the Government's interest in treaty lands and in patented lands by reference to this Court's opinion in *Oneida Indian Nation v. County of Oneida,* 414 U. S. 661 (1974). In that case the issue presented was whether the Federal Court had *jurisdiction* pursuant to 28 U. S. C. 1331 and 1362 to consider whether a conveyance of tribal land to the State of New York violated the Nonintercourse Act, 1 Stat. 137. The petitioners so alleged, and clearly, the case was a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of 28 U. S. C. 1331 and 1362. It was in this context that the Court discussed the Nonintercourse Act, and the Federal Government's special interest in enacting that legislation. It did not reach the question of whether state or federal law applies to property rights validly conveyed. Much less did the Court's opinion relate to the choice of law to be used in interpreting riparian property rights *after federal jurisdiction is invoked.* Any distinction implicit in the Court's opinion between reservation land and fee patented land was based upon the terms of the Nonintercourse Act, and not upon any inherent difference in the incidents of own-

ership *vis a vis* the rest of the world[11]. Clearly, this case offers little support for the proposition advanced[12].

The rights here involved are property rights, and no coherent reason has been advanced why these rights cannot be adequately protected by the Court applying local law, as opposed to "federal common law". There is no claim that local law is not uniform in its application, or that it would "extinguish the aboriginal rights" of the Omaha Indian Tribe to any greater or lesser extent than it would extinguish the rights of other property owners.

Indeed, as the Trial Court observed, there appears to be no real difference between local and federal law as it relates to the concepts of accretion and avulsion. App. C17. See also *Nebraska v. Iowa,* 143 U. S. 359 (1892); *Kitteridge v. Ritter,* 172 Iowa 55, 151 N. W. 1097 (1915); *Wilcox v. Pinney,* 250 Iowa 1378, 98 N. W. 2d 270 (1959); *Kinkead v. Turgeon,* 74 Neb. 573, 109 N. W. 744 (1906); *DeLong v. Olsen,* 63 Neb. 327, 88 N. W. 512 (1901); and *Gill v. Lydick,* 40 Neb. 508, 59 N. W. 104 (1894).

But the Eighth Circuit, by boldly extrapolating from two court of appeals decisions involving interstate boundaries, *Veach v. White,* 23 F. 2d 69 (9th Cir. 1927); and

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11 Concededly, tribal land is communally owned, and fee patented land is privately owned. But this is a distinction without a difference as it relates to controversies with third parties.

12 See also *Mason v. U. S.,* 260 U. S. 545, 557-8 (1923), where the distinction between federal jurisdiction and choice of law is discussed; and 28 U. S. C. 1652.

Uhlhorn v. U. S. Gypsum Co., 366 F. 2d 211 (8th Cir. 1966), fashioned new "federal common law" which neatly accommodates the plaintiffs' theories in this case. In neither of those cases were the facts similar to the one at bar. In both there was identifiable land in place. In both the changes in the channel of the rivers were influenced by dredging operations. And in both a contrary ruling (to avulsion) would have involved changing established interstate boundaries. From this, the Eighth Circuit concluded that evidence of "a sudden and unusual jump in the thalweg within the bed of a stream or over, as well as around, land (submerged or not) invokes the doctrine of avulsion . . ." App. A38-39. This, coupled with the Eighth Circuit's allocation of the burden of proof to the defendants, on the basis of 25 U. S. C. § 194, above, and its unfounded rejection of the Trial Court's laborious findings of fact[13]; obtained without the aid of *any* evidentiary presumption, produced the astonishing result that the Omaha Indian Reservation is now located in the State of Iowa, and the owners of 2,900 acres of land since the early 1900's are dispossessed.

The Eighth Circuit effectively created "federal common law" which varies drastically from local law, as well as previously established federal law. If allowed to stand, it will constitute one scheme of property rights for Indians, side by side with a different scheme for others, all within the boundaries of the sovereign State of Iowa. That is precisely what this Court sought to avoid in *Erie R.*

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13 It is axiomatic that findings of fact of the trial court will not be set aside on appeal unless clearly erroneous. Rule 52a F. R. C. P.; *Zenith Corp. v. Hazeltine*, 395 U. S. 100, 123 (1969); *Beaver v. U. S.*, 350 F. 2d 4, 7 (9 Cir. 1965).

v. Tompkins, supra, i. e., " . . . inequitable administration of the laws." *Hanna v. Plummer*, 380 U. S. 460, 468 (1965).

More recent pronouncements of this Court have amplified and continued this federal commitment to apply state law whenever it is possible to do so without violence to express federal interests, especially when the interests litigated relate to property rights. In construing California's right to regulate impoundment of water by the United States Bureau of Reclamation, this Court said the following language is "(p)erhaps the most eloquent expression of the need to observe state water law. . . .",

• • • •

> Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of water law as it has developed over the years.

California v. United States, No. 77-285, decided July 3, 1978. (The above language is reported at 57 L. Ed. 2d 1040.) See also *United States v. New Mexico*, No. 77-510, decided July 3, 1978.

There can be no serious dispute that Iowa owns the bed of the Missouri River within its boundary in the disputed area, together with islands formed therein after 1943. This Court expressly established that in *Oregon v. Corvallis Land and Gravel Co., supra*, which overruled *Bonelli Cattle Co. v. Arizona*, 414 U. S. 313 (1973) on this same issue. See also 43 U. S. C. 1301(a)(1).

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CONCLUSION

The net effect of the Court of Appeals' decision is to place the Omaha Indian Reservation on the east side of the Missouri River within the boundaries of the State of Iowa, when in the past it had always been on the west side of the River in the State of Nebraska. If allowed to stand, the State of Iowa and the other defendants in this case will be dispossessed of 2,900 acres of land, title to which was apparently secure for more than 40 years. This astonishing result is not required by federal law. On the contrary, it is plainly inconsistent with this country's historic commitment to federalism, and this Court's long standing deference to local substantive law, particularly as it relates to property rights.

Moreover, property law cannot be effectively administered unless it is uniformly applied. But the Court of Appeals' decision would create two schemes of property rights in the same locality *based upon the identity of the owners.*

The decision could have incalculable results, in other cases throughout the United States. Non-Indian owners, including States, and the Federal Government itself, could be dispossessed of their property by Indian litigants whenever it can be shown the property *might* at one time have been in the possession of Indians. The concept is especially virulent when it is applied in the context of the Eighth Circuit's loose interpretation of the law of avulsion. As this case shows, the burden of proof upon non-Indian owners of riparian land may be impossible to sustain, even when their titles are concrete by ordinary standards.

The Court of Appeals' order should be reversed, with instructions to affirm the Trial Court's judgment.

Respectfully submitted,

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FOR ARGUMENT

In The

Supreme Court of the United States

October Term, 1978

No. 78-161

STATE OF IOWA, STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Petitioners,

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R. G. P. INCORPORATED, DARRELL L., HAROLD, HAROLD M. AND LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON AND TRAVELERS INSURANCE COMPANY,

Respondents
(Petitioners on Separate Petitions),

vs.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

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ARGUMENT

I.

25 U. S. C. 194 is not applicable in a trial between a sovereign state of the United States and an organized Indian tribe represented by the United States Government.

The Brief on the Merits of these petitioners (No. 78-161, State of Iowa, State Conservation Commission of

the State of Iowa) made the point that the term "a white person" as used by 25 U. S. C. 194 does not include the sovereign states of the union. This conclusion follows from the ordinary and natural sense of the language, from judicial constructions of similar language—constructions at and around the time of the drafting of this section and in more modern cases—, and from both a reading of the whole act of which the section *sub judice* is a part and acts *in pari materia*. No. 78-161, Iowa, Br. 12-14. Iowa also pointed out that reading "a white person" as exclusive of the sovereign states of the union is consistent with this Court's decisions in other contexts, *Id.* 14 and 17 n. 6, and consistent with this Court's practice of avoiding statutory construction of doubtful constitutionality, *Id.*[1]

The Omaha Indian Tribe's brief, with one exception, never really addresses Iowa's argument that "a white

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1 The Brief for the United States argues that "to interpret 'white person' to mean Caucasian (would discriminate between Caucasian and other non-Indians and therefore) would raise serious doubts about the constitutionality of Section 194, which can and should be avoided by construing the term to mean non-Indian." United States, Br. 39. Whatever the merits of that proposition, the United States fails to point out that no such problem is created by confining the scope of the term "white person" to entities other than the states of the Union. Throughout its brief, the United States makes the erroneous suggestion that the leap from "white person" to sovereign states of the Union is no greater than the leap from "white person" to individual non-Indians, or even individual non-Indians and their business organizations. It ignores the fact that its suggested constitutional problem is as easily avoided by a construction which does not include the states. In fact, as Iowa has asserted, it is the construction of the statute to include the State which raises the constitutional problems, i. e., federalism (and comity). No. 78-161, Iowa, Br. 15.

person" does not include the State of Iowa. The single exception is the Tribe's suggestion that without that sort of expansive reading, the states of the union will defeat the purpose of the act by engaging in transfers of land from white persons to the states in order to defeat the rights of Indians. Omaha Indian Tribe, Br. 75, 84 (defeating Section 194 "by the simple transfer of title to the State of Iowa").

That suggestion is completely without basis in fact and completely unwarranted. There is no indication that Iowa or any other state will engage in land transfers to defeat the rights of Indians. The state is not in the business of defeating the rights of parties to land disputes. There is no evidence that they have done or will do so, that Congress was concerned that they would do so, or that the people of Iowa, or of any other state, would stand for them doing so. There is nothing in Section 194 which suggests a policy decision to put the burden of proof on a sovereign state when an Indian challenges the state's ownership of land.

If the Tribe is suggesting collusion between the white person and the State, there is no indication that "a white person" is going to be any more anxious to turn loose of land when the grantee is a state than when the grantee is an Indian. In any event, such a course of action designed to defeat the rights of Indians could certainly be dealt with as intentional racial discrimination on the part of the state.

The Brief for the United States argues a Congressional policy to protect Indians against the loss of their lands to non-Indians rather than just "white persons."

United States Br., *passim*, including 32, 37. The brief adds no arguments to that presented by the Omaha Indian Tribe of a Congressional policy to protect Indians against the states of the Union. United States Br. 41-44.

The Solicitor General's brief argues that

> "if the private non-Indian owner had retained the claim to the land, and an Indian claimant had made out a presumption of title, Section 194 would have required the non-Indian claimant to carry the burden of proof. But, under petitioners' theory, if the state acquired its claim from the non-Indian—and presumably took no better claim than its grantor had—Section 194 would not apply as between the Indian claimant and the state."

Id. at 43.

That latter characterization of Iowa's position, "if the State acquired its claim from the non-Indian . . . Section 194 would not apply as between the Indian claimants and the state," is correct. It is also true that Section 194 would not apply as between two Indian claimants, one of whom had acquired his claim from "a white person," even though the second Indian acquired his interest under this same cloud on his title, suggested by the United States.[2]

The United States argues in addition that "a review of the other provisions of the (act) and its predecessor

2 The latter is true, that is, unless the Tribe and the United Sates would have this Court read "a white person" to mean all non-Indian claimants regardless of their race or their status as "persons," plus some Indians. The United States, at least, seems not to make that argument. See United States, Br. 32, n. 25.

reveals that Congress used the phrase white person in contexts where it plainly referred to all non-Indians." United States, Br. 32-33. They then cite and discuss a number of sections of the act. Whatever those sections indicate about extending the reach of the term "white person," not a single one "plainly" refers to the state. On the contrary, a great many of the term's uses "plainly" and necessarily are *not* meant to include states. *Id.* and No. 78-161, Br. 13-14.

Iowa does not argue that "person" cannot include states, only that ordinarily, and in this instance, it does not. No. 78-161, Iowa, Br. 12-14. The United States cites four cases in which this court has interpreted the statutory term "person" to include states. United States, Br. 42. In two of these, *Hawaii v. Standard Oil Company*, 405 U. S. 251, 261 (1972) and *Georgia v. Evans*, 316 U. S. 159 (1942), the federal statutes involved, the Clayton Act and the Sherman Antitrust Act respectively, were expansive, and not restrictive, of the rights of the states. The states sought such an interpretation and infringement of states' rights was not involved. The other two, *Sims v. United States*, 359 U. S. [illegible] (1959) and *Ohio v. Helvering*, 292 U. S. 360 (193[illegible] the general rule in the interpretation of "[illegible]venue measures" that "statements of general application" are "operative in the case of state activities." *Sims v. United*

3 Compare *Parker* v. *Brown*, 317 U. S. 341 (1943), where this Court, one year after finding that states were "persons" for purposes of bringing suit under the Sherman Antitrust Act, *Georgia* v. *Evans*, 316 U. S. 159 (1942), found that they were not "persons" for purposes of violating the Act. *Parker* v. *Brown, supra*, 317 U. S. at 351.

States, supra, 359 U. S. at 112. In each of the four cases this Court found a Congressional intent to read "person" to include a state. As noted above, and in our initial brief, at 12-14, no such intent is present here.

II.

The Court of Appeals decision violates established principles of federalism.

A. The issues raised by the State of Iowa are properly before the Court.

The Omaha Indian Tribe dismisses the State of Iowa's second argument with the facile assertion that it does not address the issue presented in its petition for certiorari, and, accordingly, "The Tribe is proceeding on the basis that the issue of Iowa's title is no longer before the Court." Omaha Indian Tribe, Br. 28-29, 79-83.

Assuredly, point 4 of "Questions presented for review" in Iowa's petition for certiorari refers to "Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries."[4] But the heading of the discussion of that issue, under "Reasons for granting the writ" states, "4. The Court of Appeals decision violates established principles of Federalism."[5] This is identical to the heading of Point II of Iowa's brief on the merits. No. 78-161, Iowa, Br. 18. Moreover, the argument presented in Point II of Iowa's brief is fairly encompassed within its discussion of the

4 Petition, No. 78-161, p. 3.

5 *Id.,* p. 11.

"Reasons for granting the writ" contained in point 4 of its petition.

Surely, this Court's Rule 40 does not supply the Tribe with an adequate reason for "proceeding on the basis that the issue of Iowa's title is no longer before the Court."[6]

Likewise, the Tribe avoids the merits of arguments presented by Iowa and 44 other sovereign states of the United States concerning their ownership of the beds of navigable rivers within their boundaries with the bare assertion that Iowa "offered no evidence in support of its claims", and, "Iowa adopted *en toto* the very extensive evidence offered by Petitioners Wilson, Lakin and Jackson." Omaha Indian Tribe, Br. 80, 86-88. Of course it is immaterial that in a trial involving multiple parties and multiple counsel, that one attorney elicits oral testimony on behalf of all. And the exhibits themselves show that much of the land in dispute arose as bars, islands and other accretions to the bed of the Missouri River. The fact that Iowa also accepted quit claim deeds from Lakin and Peterson, who were private riparian owners, and relied in part upon these deeds at the trial of the case, does not deprive it of the equally valid claim based upon its ownership of the bed of the River.

It is worthy of note that *Bonelli Cattle Co. v. Arizona,* 414 U. S. 313 (1973) was the prevailing law on this point at the time of trial. Had this Court's decision been rendered in *Oregon v. Corvallis Sand & Gravel Co.,* 429

6 Rule 40 (1) (d) (2) states in pertinent part, "The phrasing of the questions presented need not be identical with that set forth in . . . the petition for certiorari . . ."

U. S. 363 (1977) at that time, the emphasis of Iowa's case might have been different. But, concededly, from the beginning of these proceedings, Iowa has claimed the land in issue in part upon the basis of its ownership of the bed of the River. Omaha Indian Tribe, Br. 33-34; App. pp. 90-93, 152-155. And if the exhibits show anything, it is that much of the land claimed by Iowa arose from the bed of the River.

It is respectfully submitted that the issues raised in the second point of Iowa's brief are properly before this Court.

B. Local law, and not "federal common law" should be applied to determine the issues of this case.

The Brief for the United States addresses itself to the more pertinent question of whether the facts of this case require application of "federal common law". Principal reliance is placed upon this Court's decision in *Oneida Indian Nation v. County of Oneida*, 414 U. S. 661 (1972). United States, Br. 58.

There can be no argument, and there is none, that the issue before this Court in *Oneida* was whether the Trial Court had *subject matter jurisdiction* under 28 U. S. C. 1331 and 1362. United States, Br. 59. Concededly there was, because the controversy arose under a federal statute. Indeed, it would appear the only basis for the Indian claim was an apparently plain violation by the State of New York of the Federal prohibition against conveyance of Indian land without the consent of the United States, contained in the Non-intercourse Act, 1

Stat. 137. But the United States goes further, and argues the case stands for the proposition that "federal common law", widely at variance with local law, as well as previously recognized federal law, must be applied to determine the issues of *this case.*

Unlike *Oneida,* all parties to the case at bar concede federal jurisdiction was properly invoked. Consequently, the issue here is not whether there is federal jurisdiction, but whether, once jurisdiction is invoked, the federal courts will look to local law in determining the rights to ownership of real property. There is nothing in *Oneida* to suggest that local property law, applicable to Indians and non-Indians alike, and not inconsistent with federal law, will be disregarded in the federal courts. In this vein, Justice Rehnquest, joined by Justice Powell, said,

> The federal courts have traditionally been inhospitable forums for plaintiffs asserting federal-question jurisdiction of possessory land claims. The narrow view of the scope of federal-question jurisdiction taken by the federal courts in such cases probably reflects a recognition that federal issues were seldom apt to be dispositive of the law suit. * * *

Oneida, supra, at 414 U. S. 683.

Petitioner's agree that the United States has a continuing interest in the rights of the Omaha Indian Tribe to its reservation lands. But this is not to say that the Federal Government's interest requires abrogation of well-established local property law, applicable to land owned by Indians and non-Indians alike. Indeed, until the Court of Appeals' decision in this case, federal law concerning accretion and avulsion was wholly consistent with local law. See, 78-161, Iowa, Br. 10-11, 25-26. In a comparable

case, *U. S. v. Oklahoma Gas Co.*, 318 U. S. 206 (1942), this Court said,

> The interpretation suggested by the Government is not shown to be necessary to the fulfillment of the policy of Congress to protect a less-favored people against their own improvidence or the overreaching of others; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the State . . .

Id., p. 211.

The Government seeks to distinguish *U. S. v. Oklahoma Gas Co.* on the basis that the federal statute granting authority in that case to open and establish public highways included the phrase "in accordance with the laws of the State or Territory in which the lands are situated." United States, Br. 66. Nevertheless, the issue before the Court was whether Federal statutory authority to open and establish public highways also included the authority to erect electric transmission lines, and, in deciding it, this Court adhered to the time-honored rule that local law applies unless federal interests otherwise require.

The Government's policy arguments to support its contention that federal interests require application of "federal common law", United States, Br. 67-71, are both strained and inapplicable to the circumstances of the case at bar. The Trial Court's judgment will not cut off the Omaha Indian Tribe's access to the Missouri River. It will not deprive it of farming, hunting or fishing land which it possessed at any time during the past century, until it forcibly occupied the disputed land with the aid of the Bureau of Indian Affairs in 1975. And the fact

that the Tribe might be deprived of 2,900 acres which it *claims* to own in this case, plus an additional 8,000 acres it *claims* to own in a related case, begs the questions of whether its claims are valid, and according to what law they should be determined. Surely a bare assertion of ownership by an Indian Tribe does not constitute a federal interest sufficient to override long and well-established local property law, as well as previously recognized federal law.

C. Federal law concerning interstate boundaries is inapplicable to this case.

The Government's argument that this case should be decided according to federal common law governing interstate boundaries is equally strained. It is well to remember that disputes involving interstate boundaries present unique choice of law problems. As this Court said in *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363, 375 (1977),

> . . . If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary. (Citations omitted.)

In disputes between sovereign states over their common boundaries, the only appropriate law is federal law. But in the case at bar there is no dispute over the common boundary between Iowa and Nebraska. Much less is there any conflict in the laws of the two states on this subject. (As discussed in Iowa's Brief, pp. 9, 20-21, any possible conflict was resolved by the Trial Court in favor

of the respondents.) And notwithstanding the Government's attempt to analogize the aspects of sovereignty enjoyed by Indians while residing on reservations to the sovereignty of States, United States, Br. 74-75, a crucial difference remains: Indian "sovereignty" relates to their *internal* affairs. Until the Eighth Circuit's decision in this case, no court has held that Indian Reservation land is so sacrosanct that portions of it may not be washed away in the same manner that land belonging to other property owners, including the State of Iowa, may be washed away.

The Court of Appeals reliance upon *Veach v. White*, 23 F. 2d 69 (9th Cir. 1927) and *Ulhorn v. U. S. Gypsum Co.*, 366 F. 2d 211 (8th Cir. 1966) is misplaced. Both cases involved "pressing back" state boundaries. The Court in *Ulhorn* said,

> Thus, we are convinced that no established rule requires or even permits a change in the state boundary here. If it were necessary to adopt a new rule or law, it should favor the continuation of the long existence of the state boundary rather than a change therein.

And neither *Veach v. White* nor *Ulhorn* support the Court of Appeals' broad conclusion that "a sudden and unusual jump in the thalweg within the bed of a stream or over, as well as around, land (submerged or not) invokes the doctrine of avulsion . . ." App. A 38-39.

The Government also argues that under Sections 2 and 3 of Iowa-Nebraska Boundary Compact, and this Court's decision in *Nebraska v. Iowa*, 406 U. S. 117 (1972), the respective states are obligated to recognize title to land affected by the boundary change in 1943. The Government further argues that *if* these cases were litigated prior to 1943, they *might have involved* a determination of the boundary between Iowa and Nebraska, so that federal law would apply. United States, Br. 73-74. Apparently the Government argues from this that it is now necessary to go back to 1943, determine what title the Omaha Indian Tribe had to the disputed land at that time, according to Federal law, and proceed accordingly.

This speculative argument ignores the fact that the most the Tribe would have been entitled to do would have been to present proof of title "good in Nebraska" according to Nebraska law.[7] And, since this case was litigated in 1976, it could not involve "pressing back" an interstate boundary. The reasons for applying "federal common law" relating to interstate boundaries do not exist in this case.

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7 This Court, in *Nebraska v. Iowa*, held that riparian land north of Omaha, including the land here in issue, was formed after 1943, and as to that land, "claimants of title to these areas as against Iowa may also have the opportunity to show title 'good in Nebraska' on the Compact date, July 12, 1943 . . ." *Id.*, at 406 U. S. 125. Study of the opinion shows this Court was speaking of titles good according to Nebraska law, which differs from Iowa law in a number of respects, including private riparian ownership to the thread of the stream, and titles obtained by adverse possession without requirement of a record title. *Id.*, at 406 U. S. 123. The Omaha Indian Tribe had the benefit of these differences between the laws of Iowa and Nebraska when the Trial Court adopted Nebraska law in deciding this case.

———o———

CONCLUSION

Long standing and fundamental principles of federalism have been violated in this case, as well as the plain terms of the Tenth Amendment. Within living memory the land in issue has always been on the west bank of the Missouri River within the State of Iowa. The Omaha Indian Reservation has always been on the west bank of the River, entirely within the State of Nebraska.

Based upon a clearly and concededly erroneous belief by Solicitor Kent Frizzell, of the U. S. Department of Interior, that the disputed land was cut off from the Omaha Reservation by a U. S. Corps of Engineers rechannelization project in the 1940's, App. 114, the Tribe, aided by the United States Bureau of Indian Affairs, forcibly occupied the land in 1975, and summarily dispossessed the owners, including the State of Iowa.

In the ensuing trial in the District Court, petitioners proved that land connected to the Omaha Indian Reservation in the same location, which extended into the flood plain of the wild and uncontrolled Missouri River, washed away, and was destroyed by the River a century ago; and the land in issue is new land, formed on the Iowa side of the River.

The Court of Appeals, extrapolating from two cases involving interstate boundaries, incorrectly fashioned new "federal common law", that "a sudden and unusual jump in the thalweg within the bed of a stream or over, as well as around, land (submerged or not) invokes the doctrine of avulsion." Such events would be difficult to prove on a day to day basis when they occurred. By

incorrectly applying 25 U. S. C. 194, the Court of Appeals cast upon the State of Iowa and the other petitioners herein the burden of proving they did not occur more than a century ago. This impossible task is not permitted, much less required, by any federal interest, statute, treaty or rule.

The Court of Appeals' decision should be reversed, and the Trial Court's judgment affirmed.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-161

STATE OF IOWA, STATE CONSERVATION COMMISSION
of the STATE OF IOWA,
Petitioners,

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FLORENCE LAKIN; R.G.P. INCORPORATED,
DARRELL L. HAROLD, HAROLD M. and LUEA SORENSON,
HAROLD JACKSON, OTIS PETERSON and
TRAVELERS INSURANCE COMPANY,
Respondents (Petitioners on Separate Petitions),

vs.

OMAHA INDIAN TRIBE and the UNITED STATES OF AMERICA,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA, TEXAS, MONTANA, MINNESOTA, PENNSYLVANIA AND COLORADO, IN SUPPORT OF PETITIONER, STATE OF IOWA

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JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. §1254(1), this Honorable Court has granted in part the petitions of the State of Iowa and of the State Conservation Commission of the State of Iowa for a writ of certiorari to review a decision of United States Court of Appeals for the Eighth Circuit.

The State of California, by and through its State Lands Commission and its Attorney General Evelle J. Younger, respectfully submits this brief as amicus curiae under authority of Rule 42(4), United States Supreme Court Rules. The States of Texas, Montana, Minnesota, Pennsylvania and Colorado, acting by and through their Attorneys General, join with California in this brief.

INTEREST OF AMICUS CURIAE

This case presents issues that directly bear on the sovereignty of the States of the United States. The decision below touches both the sovereign authority of the States as well as their sovereign land titles. It departed from long-settled authority and applied "federal common law" to determine titles to land wholly within a State, and by application of federal common law and of Title 25 U.S.C. Section 194 (hereinafter "Section 194"), subjected the State of Iowa's absolute title to lands underlying navigable waters, acquired upon admission to statehood, to a federal principle of land title in contravention of the plain holding of *State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 374 (1977) (hereinafter "*Corvallis*").

The ramifications of the Eighth Circuit's decision are vast. If not overturned, the Court of Appeals' choice of law and use of the presumption purportedly created by Section 194 will disturb land titles, particularly titles to millions of acres of sovereign lands, in every State of the Union. The States' sovereign titles and their concomitant trust obligations have been established in our jurisprudence since *Pollard's Lessee v. Hagan*, 3 How. 212 (1845). Cases of these sovereign rights in land have long been placed among the most important controversies before the Court, ". . . either as . . . respects the amount of property involved, or

the principles on which the . . . judgment proceeds . . . ." *Id.* at 235 (Catron, J., dissenting).

The acts of the Court below, if allowed to stand, could severely impinge on the sovereignty of the amicus States. For in the same capacity as the other States, the amicus States hold in trust for all their citizens title to millions of acres of sovereign lands. California for example is a party to litigation concerning the Colorado River in which the principles of this case could have marked effect. And also in these States are millions more acres of land whose landowners have relied for more than a hundred years on the continued application of state law to their titles. California and the other amicus States are thus vitally interested in the outcome of this case.

QUESTIONS PRESENTED

1. Whether the application of a federal common law of river movement to determine title to land violates that attribute of a State's sovereignty which permits the State to make its own rules of title for lands within its borders, and particularly for lands which the State acquired as an attribute of sovereignty upon statehood.

2. Whether the application of Section 194 of Title 25, United States Code, to a State's claim of sovereign-land title violates the Equal-Footing Doctrine.

SUPPLEMENTARY STATEMENT OF THE CASE

The United States Court of Appeals for the Eighth Circuit reversed a judgment in favor of Iowa and other non-Indian claimants, which had quieted title to lands in the present bed of the Missouri River and other lands directly

east thereof (hereinafter "Barrett Survey Area") against the Omaha Indian Tribe ("Omahas") and the United States, acting as trustee for the Omahas.

In December, 1846, Iowa was admitted to the Union and, so far as pertinent here, its western boundary made the center of the main channel of the Missouri River. By virtue of the sovereignty attained upon its admission, Iowa acquired title to the bed of the Missouri River east of its main channel and the concomitant authority to apply its own property law to lands within its borders. Eight years later, in March, 1854, the Omahas entered into a treaty with the United States. In that treaty the Omahas ceded certain lands to the United States and reserved ". . . for their future home . . ." other lands acceptable to the Omahas not to exceed 300,000 acres bounded on the *east* by the main channel of the Missouri River. Act of March 16, 1854, Art. 1, 10 Stat. 1043.[1] The Barrett Survey Area was at that time located within the Territory of Nebraska, west of the center of the main channel of the Missouri River.

Thus the center of the great Missouri River formed a common boundary between the lands of the Omahas and sovereign lands of the State of Iowa. The center of the River also became later the common political boundary between the State of Iowa and the State of Nebraska when Nebraska was admitted to the Union in 1867. *Nebraska v. Iowa*, 406 U.S. 117, 118 (1972).

The river has a capricious nature.

[1]In that same treaty, the Omahas relinquished their claims to lands lying east of the Missouri River. *Id.* at Art. 3, 10 Stat. 1044.

> "[It] is a vagrant, turbulent stream. Its name reflects this character. The Big Muddy is said to carry more silt than any other river except the Yellow River in China. It is constantly changing its course within the region between its bluffs, shifting from side to side as natural forces work upon its flow."
>
> *Kansas v. Missouri*, 322 U.S. 213, 216 (1944).

The rapid current of the Missouri River combines with its seasonal rises, and

> "[w]henever it impinges with direct attack upon the bank at a bend of the stream, and that bank is of the loose sand obtaining in the valley of the Missouri, it is not strange that the abrasion and washing away is rapid and great."
>
> *Nebraska v. Iowa*, 143 U.S. 359, 368 (1892).

Given these factors, it is no wonder that the shifts of the Missouri River have been constant and varied. In fact so numerous and intricate were shifts of the Missouri River that, by 1943, the interstate boundary between Nebraska and Iowa was impossible to locate. *Nebraska v. Iowa, supra,* 406 U.S. at 119.

The mercurial nature of the River is reflected in this case. By 1943, it had wandered more than two miles west of its assumed location in 1854. As a result the Barrett Survey Area, formerly located on the *west* (Nebraska) side of the Missouri River, was now located on the *east* (Iowa) side of the River.

The States of Iowa and Nebraska, recognizing the overwhelming difficulties in locating their common boundary after a century of such movements, agreed by compact to a permanent, fixed location of that boundary. *Nebraska*

v. Iowa, supra, 406 U.S. at 119; Iowa Code 1971, p. lxiv, Iowa Acts of 1943, c. 306; Nebraska laws 1943, c. 130. Congress approved the boundary compact. Act of July 12, 1943, 57 Stat. 494. Thus, the interstate boundary is now fixed and cannot be affected by this litigation. The dispute in this case rather is whether the movement of Missouri, the common *property* boundary between the Omahas' reservation and the State of Iowa's sovereign river lands, resulted from the gradual and imperceptible process of accretion and erosion, as asserted by Iowa and the non-Indian claimants (who are Iowa riparian landowners), or from the sudden and perceptible process of avulsion, as claimed by the Omahas and the United States.

The non-Indian claimants or their predecessors in interest had occupied the land from the early 1900's until April 2, 1975, when the Omahas, with assistance of the Bureau of Indian Affairs, seized possession of the land and began farming it. Thereafter, the Omahas brought this suit to quiet title to the Barrett Survey Area now lying in Monoma County, Iowa. Iowa and the non-Indian claimants asserted title to that same area and also sought to quiet title thereto.

Iowa and the non-Indian claimants contend that the Barrett Survey Area was washed away by gradual river action, that the lands now located in the Barrett Survey Area are alluvial deposits to Iowa riparian land and that by this process the common property boundary between Iowa's sovereign lands and the Omahas' lands moved westward.

At trial, the District Court determined that each side would bear the burden of persuasion as to the facts establishing their respective claims, disregarding Section 194

which the Omahas and the United States claimed reallocated such burden to Iowa and the non-Indian claimants. *United States v. Wilson,* 433 F.Supp. 57, 66 (N.D. Iowa 1977) (hereinafter *"Wilson I"*). The District Court found that the River, and hence the common property boundary, had moved westward through the process of accretion and erosion as contended by Iowa and the non-Indian claimants. It further found that the United States and the Omahas failed to prove that the river moved by any sudden change. Title to the disputed lands was therefore quieted in Iowa and the non-Indian claimants. *United States v. Wilson,* 433 F.Supp. 67, 88-92 (N.D. Iowa 1977) (hereinafter *"Wilson II"*).

On appeal, the Eighth Circuit reversed, holding that federal common law and not the state law of river movement should have been applied. Moreover, it applied Section 194 to all defendants, having found historical possession or ownership by treaty to the lands within the perimeter boundaries of the Barrett Survey Area as those lands existed in 1854. Moreover, it applied Section 194, having found that the Omahas had enjoyed historical possession or ownership by virtue of the Treaty to the area encompassed within the perimeter boundaries of the Barrett Survey Area. In making this finding, the Eighth Circuit ignored the problem whether post-1854 changes in the course of the Missouri River constituted a continuing shift of the boundary of the lands owned or possessed by the Omahas. Thus, pursuant to Section 194, Iowa and the non-Indian claimants were required to assume the burden of proving the common boundary shifted by reason of accretion and erosion. *Omaha Indian Tribe, Treaty of 1854, etc. v.*

Wilson, 575 F.2d 620, 650-651 (8th Cir. 1978) (hereinafter *"Wilson III"*). Holding further that Iowa and the non-Indian claimants failed to sustain what it recognized as "indeed an onerous burden" of proving events occurring more than 100 years ago, the Court of Appeals vacated the District Court's judgment and remanded the case with directions to enter judgment quieting title to the Barrett Survey Area—including river lands in the present bed of the Missouri River—in the Omahas and the United States as trustee. *Id.* at 651.

SUMMARY OF ARGUMENT

This writ is a consequence of two fundamental errors of the Eighth Circuit: that this property-boundary dispute "concerns" the political boundary separating Iowa and Nebraska, and that the title claims of the non-Indian claimants are an attempt to abrogate property rights of the Omahas granted by treaty.

The political boundary between the States of Iowa and Nebraska was fixed in location in 1943 by compact. Nothing that could be adjudicated in this case could in any manner dislocate that boundary, for neither is it an issue in the case, nor is Nebraska a party. Contrary to the opinion of the Court below, the interstate boundary is simply not concerned. *Wilson III, supra,* 575 F.2d at 628-629. Even if that line had not been fixed by compact however, and its location were put in issue in this case, nothing in the use of federal common law to locate that *political* boundary would in any way derogate from the principle that state law governs the location of *property* boundaries.

Furthermore, this case presents no issue of the interpretation of a federal grant, nor of the Treaty with the Omahas. The issue is what incidents of riparian ownership attach to the grant to the Omahas. These incidents are not determined by construction of the grant but by examination of state law. For they exist not by virtue of the grant, but by operation of the law of the state in which the lands lie.

No exception should be made to the fundamental tenet of our federalism that the States may establish for themselves rules respecting the title and boundaries of real property. This principle holds as to all classes of land, including lands owned by Indians. But when the title to or boundaries of sovereign lands are questioned, there is an added reason for unwavering adherence to it. For the title of a State to its sovereign lands, that is,

> ". . . lands underlying navigable waters within its boundaries [,] is conferred not by Congress but by the Constitution itself. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is *absolute so far as any federal principle of land titles is concerned.*" (Emphasis supplied.) *Corvallis, supra,* 429 U.S. at 374.

Thus the use by the Court below of a "federal common law" of river movement—of accretion and avulsion—violated two attributes of Iowa's sovereignty: first, that attribute which permits the States to make their own rules of real-property boundaries and titles; and second, that attribute which vested in Iowa, eight years before the Treaty with the Omahas, a title to her sovereign lands "absolute so far as any federal principle of land titles is concerned."

By applying section 194 to Iowa's claim to sovereign lands, the Eighth Circuit again violated this second attribute of Iowa's sovereignty.

I

FUNDAMENTAL PRINCIPLES OF FEDERALISM HAVE LONG COMPELLED THE USE OF STATE LAW TO RESOLVE CONFLICTING CLAIMS TO REAL PROPERTY, ESPECIALLY WHEN ONE OF THE CLAIMS IS THAT OF A STATE TO ITS SOVEREIGN LANDS

The Tenth Amendment and the Equal-Footing Doctrine preserve and protect the sovereign power of each State to establish for itself a system of laws for determining title to land within its borders. In choosing to apply federal law in a property-boundary dispute—this is not a political-boundary dispute—the Eighth Circuit vitiated constitutional principles of fundamental importance to the federal system, revived the long-interred doctrine of federal common law and raised the distinct possibility of two systems of law for determining land-title disputes—one for Indians (and their non-Indian neighbors), and one for non-Indians (having no Indian neighbors).

The classic expression of the force of the Tenth Amendment is found in *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). In that case, Justice Brandeis, after setting forth the reasons for the decision and the background of the rule of *Swift v. Tyson,* 16 Pet. 1 (1842), wrote for the Court:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no

> federal general common law. Congress has no power to declare substantive rules of common law applicable in any case is the law the State. . . . There is no ports to confer such a power upon the federal courts. . . .
>
> [In applying the doctrine of *Swift v. Tyson*] *this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." Id.* at 78-80. (Emphasis added.)

Significantly, even when the lessons of *Swift* were in vogue, "federal common law" did not govern real-property disputes. An exception was made for the local law of real property because of the immovable and intra-territorial nature of real property. *Swift, supra,* 16 Pet. at 17-18. As most recently uttered in *Corvallis,* "[u]nder our federal system property ownership is not governed by a general federal law, but rather by the laws of the several States." *Corvallis, supra,* 429 U.S. at 378.

The Equal-Footing Doctrine too defines the sovereign authority of the States to govern the titles to real property within their borders. And it defines in addition another fundamental attribute of that sovereignty, the States' titles to lands beneath navigable waters. Mr. Justice Stewart, dissenting in *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973), delineated the contours of the Equal-Footing Doctrine as it was to be reaffirmed by a majority of the Court three years later in *Corvallis, supra,* 429 U.S. at 381-382, as follows:

> "I think this ruling [the majority opinion in *Bonelli*] emasculates the equal-footing doctrine, under which this Court has long held 'that the new States since

admitted have the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders.' . . .

"After the Revolution, the 13 Original States succeeded both to the Crown's title to the beds underlying navigable rivers and to its sovereignty over that property. . . . '[T]he shores of navigable waters and the soils under the same in the original States were not granted by the Constitution to the United States, but were reserved to the several States.' . . . If the equal-footing doctrine means what it says, then the States that were later admitted to the Union must hold the same title and must exercise the same sovereignty. . . . *Just as with other real property within the State's boundaries, an element of sovereignty over the property constituting the riverbed is the power of the State's courts to determine and apply state property rules in the resolution of conflicting claims to that property.*" *Bonelli, supra,* 414 U.S. at 332-333. (Stewart, J., dissenting.) (Citations omitted; emphasis supplied.)

These constitutional principles operate to assure that within each State there exists an integral, consistent local scheme of land title based on the pertinent geographical, geological, legal, or political considerations applicable in each State, under which purchasers and sellers of real property can make rational judgments concerning the nature and extent of land title conveyed and delivered in each State. Whether title derives from the federal government or from other sources, these principles require that local real-property rules obtain.

This long-standing principle was enunciated early in *Wilcox v. Jackson,* 13 Pet. 496 (1839). There the Court stated:

". . . [W]henever the question in any Court, State or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but . . . whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." *Id.* at 517.

This precept has been followed in a long line of cases concerning land titles derived from the United States and bounded by a water boundary. *Barney v. Keokuk,* 94 U.S. 324, 337 (1876); *Packer v. Bird,* 137 U.S. 661, 669 (1891); *St. Louis v. Rutz,* 138 U.S. 226, 242 (1891); *Joy v. St. Louis,* 201 U.S. 332, 342 (1905); *Corvallis, supra,* 429 U.S. at 378.

In *Joy,* it was determined that a mere claim to land under a federal confirmatory patent was not sufficient to provide federal-question jurisdiction. *Joy, supra,* 201 U.S. at 340. In so doing, the opinion addressed the precise issue now confronting this Court:

". . . [T]he controversy in dispute is not at all in regard to the land covered by the letters patent or by the acts of Congress, and no dispute is alleged to exist as to such land, but the dispute relates to land, 'which land is a portion of the land formed by accretions or gradual deposits from said river, . . . and which thereby became a portion of the land granted by said letters patent and acts of Congress. . . .'

"Now, whether the land contained in the original patent reached to the Mississippi river as its eastern boundary, . . . would be a question of fact . . . and

whether the plaintiff is, upon the facts set forth, entitled to the accretion, is a question of local or state law, and is not one of a Federal nature. . . . [Citations omitted.]

"As this land in controversy is not the land described in the letters patent or the acts of Congress, but, . . . is formed by accretions or gradual deposits from the river, whether such land belongs to the plaintiff is, . . . a matter of local or state law, and not one arising under the laws of the United States." *Id.* at 342-343.

This case presents no question as to what passed out of the public domain to the Omahas by the Treaty of 1854. The Omahas were granted lands bounded on the east by the center of the Missouri River, and as all parties agree, that boundary under federal law is the thalweg.[2] *Iowa v. Illinois*, 147 U.S. 1, 13 (1893). Nor is there any question but that the boundary was intended as an ambulatory boundary, moving with gradual and imperceptible changes in the location of the thalweg, and not as a fixed boundary. *See Jones, et al. v. Johnston*, 18 How. 150, 156 (1855). The question here is simply whether state or federal law governs the effect of subsequent river movements upon the boundary, and as we have seen, the effect of those movements is governed by state law. *Joy, supra,* 201 U.S. at 342-343.

The decision in *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935), did not change the rule of *Joy*. That case held that any question of the *initial* boundary of a federal grant bordering on sovereign lands was to be determined accord-

[2]The thalweg is the center of the main channel of navigation. *Iowa v. Illinois*, 147 U.S. 1, 8 (1893).

ing to federal law. Similarly, if there were any question here (and there is not) whether the boundary of the Omahas' lands was in fact the thalweg, that question would be resolved by federal law. The decision in *Corvallis*, addressing the two attributes of state sovereignty in issue here, made clear that *Borax* and certain subsequent cases[3] were not authority to apply federal law to determine the effect upon the boundary of subsequent changes in the watercourse (in the case of *Borax*, the shoreline):

". . . [The *Borax*] principle would require that determination of the initial boundary between a riverbed, which the State acquired under the equal-footing doctrine, and riparian fast lands likewise be decided as a matter of federal rather than state law. But that determination is solely for the purpose of fixing the boundaries of the riverbed acquired by the State at the time of its admission to the Union; thereafter the role of the equal-footing doctrine is ended and the land is subject to the laws of the State. The expressions in *Bonelli* suggesting a more expansive role for the equal-footing doctrine are contrary to the line of cases following *Pollard's Lessee.*" (Footnote omitted.) *Corvallis, supra,* 429 U.S. at 376-377.

A final point must be made. While the Court of Appeals recognized the principle set out hereinabove, *Wilson III, supra,* 575 F.2d at 629, it revealed a crucial misunderstanding of fundamental property law when it wrote:

"In *Packer v. Bird* [citations omitted] the Court observed:

The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States

[3]*Hughes v. Washington*, 389 U.S. 290 (1967); *Bonelli, supra.*

> for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of property by the grantee.
>
> "The present dispute is not related to incidents or rights flowing from a conveyance of public lands or related to a patent grant of Indian allotment lands. Instead, the direct challenge made by the Iowa landowners here affects the boundary line to the reservation land itself. . . ." *Id.*

The present dispute is precisely "related to incidents or rights flowing from" the Government's grant to the Omahas. The "incidents or rights" spoken of by the *Packer* Court are those relating to the riparian nature of the grant. *Packer v. Bird, supra,* 137 U.S. at 669-70. They include the right of accretion, the risk of erosion, and the right to a fixed boundary if the river moves by avulsion. True, the "courts of the United States will construe the *grants* of the general government without reference to the rules of construction adopted by the States for their grants." (Emphasis added). *Id.* at 669. Such construction would be used to determine, for example, the meaning of a mineral reservation, whether the grant is subject to a condition subsequent, and what the initial boundary of the grant was intended to be. (All parties agree the thalweg was intended and not a line fixed at the 1867 location of the thalweg.) But thereafter, as *Corvallis* held, the force of federal law is spent, and the effect of any changes in the river upon the boundary must be determined according to state law. *Corvallis, supra,* 429 U.S. at 376-381.

It is this fundamental principle of federalism that amici urge the Court to continue to affirm.

II

NO SOUND REASONS EXIST FOR THE EXCEPTIONS PROPOSED TO THE PRINCIPLE THAT STATE LAW GOVERNS CONFLICTING CLAIMS TO REAL PROPERTY

A. The Assertion that an Interstate Boundary Is "Concerned" Is a Misconception, and Affords No Basis for Applying Federal Law.

The Eighth Circuit reasoned, improperly seizing upon language in *Corvallis, supra,* 429 U.S. at 375, that because the center of the main channel of the Missouri River once constituted the political boundary separating Iowa and Nebraska, federal law must be applied to resolve the property boundary in dispute herein. (In the Barrett Survey Area, the center of the Missouri's main channel ceased being the political boundary upon the ratification of the Compact in 1943 at the latest. It may have ceased being the political boundary even earlier, if it had jumped places by avulsion.) It is indisputable that federal law applies to determine the location of political boundaries separating States. *Id.; Nebraska v. Iowa, supra,* 143 U.S. 359.

But the Eighth Circuit misapprehended the relationship between the political boundary of a State, when the center of a stream is made that boundary, and the property boundaries of land riparian to that stream. When the political boundary and a property boundary are congruent it is not because each is determined by the same system of law; it is merely fortuitous.

The error of the Eighth Circuit is immediately apparent when it is reflected that no interstate boundary is "concerned" at all. That boundary was fixed by Compact in 1943. Since this is not an action between Iowa and Nebraska, nothing that could be adjudicated in this case can "press back the boundary line from where otherwise it should be located." *Arkansas v. Tennessee,* 246 U.S. 158, 176 (1918). But the Eighth Circuit's misapprehension is far more profound, and bears careful scrutiny:

> "In this case any claim that the reservation's eastern boundary had changed would of necessity have concerned the interstate boundary between Iowa and Nebraska, at least until 1943, thereby invoking federal law *since both boundaries were located at the thalweg of the Missouri River.*" (Emphasis added.) *Wilson III, supra,* 575 F.2d at 628.

In this sentence, the court begs the very question it should have addressed, *i.e.,* whether both the political and the property boundaries were *necessarily* located at the same place in 1943. If we imagine that this dispute arose before the political boundary between Iowa and Nebraska became fixed by Compact, and that the location of that political boundary is uncertain, the error comes clear. It is necessary, to be sure, to locate that boundary so that it is known in which State the disputed lands lie. For this purpose the application of federal common law is made. *Corvallis, supra,* 429 U.S. at 575; *Nebraska v. Iowa, supra,* 143 U.S. 359. To this proposition there can be no dispute, for the evils that would attend the use of the law of either State to determine the political boundary are manifest. *See Iowa v. Illinois, supra,* 147 U.S. at 4-6.

But the determination of the political borders of a state does not of its own force adjudicate land title. When the political boundary is ascertained, the disputed land is found either all in Iowa, all in Nebraska, or partly in each. To determine title to land in Iowa, Iowa law is applied, and to land in Nebraska, Nebraska law. See *Nebraska v. Iowa, supra,* 406 U.S. at 126.

Confusion has arisen largely because in many instances —indeed possibly in this—a state's law of riparian *property* boundaries parallels the federal common law of *interstate* boundaries. For while the two bodies of law have different roots, the law of interstate boundaries has borrowed in certain instances principles from the law of property boundaries. The laws of riparian *property* boundaries derive in most States from the common law (in Texas, for example, in part from the civil law). *See New Orleans v. United States* 10 Pet. 662, 717 (1836); 7 Powell on Real Property, 610 n. 11, 611 (Rev. ed. 1977); *Luttes v. State* 324 S.W.2d 167 (Tex. 1958). The federal common law of *political* boundaries within streams, on the other hand, finds its roots in international law. *Iowa v. Illinois, supra,* 147 U.S. at 2, 8; *Arkansas v. Tennessee, supra,* 246 U.S. at 170. From international law then, this Court has chosen the fundamental principle for determining the boundary between two states separated by a navigable stream, the "thalweg principle." *Iowa v. Illinois, supra,* 147 U.S. at 13. Having done so, it has then borrowed from the more familiar common law of riparian property boundaries certain subsidiary principles. These principles are used to determine the effects of changes in the course of the thalweg upon the political boundary. *See, e.g., Arkansas*

v. Tennessee, supra, 246 U.S. at 173. But this general body of common law of course is not uniformly followed by the States in treating *property* boundaries. *See, e.g., id.* at 176.

Arkansas v. Tennessee itself makes clear that once the interstate boundary has been located, boundaries and other attributes of *property* are to be determined according to the law of the State in which the property lies.

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them." *Id.* at 175-176.

The court observed that Arkansas and Tennessee differed in their domestic laws respecting the ownership boundaries of riparian land. *Id.* at 176. It then concluded its discussion with this remark, which the Court below oddly felt supported the application of federal law to determine property boundaries (*Wilson III, supra,* 575 F.2d at 628):

> ". . . But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located." *Arkansas v. Tennessee, supra,* 246 U.S. at 176.

Nothing could be truer, nor more self-evident. For if the *political* boundary were not determined by resort to a uniform system, intolerable results would follow. By way of illustration it was noted:

> ". . . The decision of the Supreme Court of Tennessee in *State v. Muncie Pulp Co.,* 119 Tennessee, 47, sustained the claim of the State to a part of the abandoned river bed which, by the rule of the *thalweg,* would be without that State." *Id.* at 172.

Nor is there any reasoning in *Corvallis* to the contrary. *Corvallis,* in noting that federal law applied in interstate-boundary disputes, relied on the cases amici have discussed above, *Nebraska v. Iowa, supra,* 143 U.S. 359, and *Arkansas v. Tennessee, supra,* 246 U.S. 158, as authority for that conclusion. *Corvallis, supra,* 429 U.S. at 375. But the imperative rule that political boundaries are to be determined by resort to federal common law in no way derogates from the other inveterate principle that boundary shifts and other incidents of property ownership are to be determined according to the laws of the State in which the lands lie. Thus, nothing in the assertion that an interstate boundary is "concerned" (which is not the case here) compels the application of federal law to this property-boundary dispute between the Omahas and the State of Iowa.

B. State and Not Federal Law Applies to Resolve Real-Property Boundary Disputes Between Indians and Non-Indians.

The Court of Appeals also wrote that the "special relationship between the United States and the Omaha Indian Tribe and the nature of the interest litigated require application of federal law to decide the issues of river movement in this case." *Wilson III, supra,* 575 F.2d at 628-629.

Such a rule would create an aberration, not only from the *Pollard, Joy,* and *Corvallis* line of cases, but also from cases relating to the boundaries of lands granted to Indians by treaty.

In *Francis v. Francis,* 203 U.S. 233 (1906), the issue was whether, in the absence of a government patent, a clause in a treaty reserving land for the chief of an Indian tribe was sufficient to pass fee title. The Court said:

> ". . . That the construction of the treaty here involved, whereby the respective Indians named in its third article are held to have acquired by the treaty a title in fee for the land reserved for the use of themselves, *has become a rule of property in the State where the land is situated.* That rule of property should not be disturbed, unless it clearly involves a misinterpretation of the words of the treaty. . . ." (Emphasis supplied.) *Id.* at 242.

Thus the Court deferred to a state rule of property for construction of a United States treaty. Where as here no construction of a treaty is necessary, and hence no risk of misinterpretation, an even stronger case is made for the application of state rules to determine the common property boundary between the Omahas' lands and the lands of the competing claimants. *Francis'* deference to state rules of property was a recognition that even in cases of Indian land claims, state property law, created from the circumstances peculiar to the State, should apply to all land within the State. Consistency and certainty of result require as much, and later cases develop this reasoning.

In *Oklahoma v. Texas,* 258 U.S. 574 (1922), the United States intervened in a dispute between the two States over their common boundary along the Red River, in part because of the United States' relation to Indian allottees who were riparian to the river. *Id.* at 579, 582. The Court, having held that the United States owned the bed of the nonnavigable Red River, *id.* at 591, stated:

> "Where the United States owns the bed of a nonnavigable stream and the upland on one or both sides, it, of course, is free when disposing of the upland to retain all or any part of the river bed; and whether in any particular instance it has done so is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland or to that and a part only of the river bed, that intention will be controlling; [footnote omitted] and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the State in which the land lies. [Footnote omitted.] Where it is disposing of tribal land of Indians under its guardianship the same rules apply." *Id.* at 594-595.

See Brewer Oil Co. v. United States, 260 U.S. 77, 88-89 (1922).

In this case of course there is no dispute as to the intent of the United States at the time of creation of the Omahas' Reservation. The Omahas' reservation lands were bounded on the east by the center of the main channel of the Missouri River. Act of March 16, 1854, Art. 1, 10 Stat. 1043. This boundary was an ambulatory line, not a line fixed in location at the time of the grant. *Fontenelle v. Omaha Tribe of Nebraska,* 298 F.Supp. 855, 860 (D. Neb. 1969) (hereinafter *"Fontenelle I"*), *aff'd.,* 430 F.2d 143 (8th Cir. 1970) (hereinafter *"Fontenelle II"*). The Omahas' reservation lands did not and were not intended to include any lands east of that boundary, as the Omahas

relinquished all their rights in such lands by their treaty. Act of March 16, 1854, Art. 3, 10 Stat. 1044.

Significantly, if any intention of Congress may be inferred from the Omahas' treaty, it is that state law govern property questions respecting the reserved lands. The treaty provides that the President may issue patents for portions of the reservation lands to Indians who wish to locate a permanent home. The patents were to be made subject to the condition that the patented tracts could not be conveyed for two years,

> ". . . and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions." Act of March 16, 1854, Art. 6, 10 Stat. 1044-1045.

In the only previous case to have considered the effect of a movement of the River upon the boundary of these same Omahas' lands, the district court, affirmed by the Eighth Circuit, held that state and not federal law determined the location of that boundary. *Fontenelle I, supra,* at 861; *aff'd., Fontenelle II, supra.*

State law was also applied in *U.S. v. Oklahoma Gas Co.,* 318 U.S. 206 (1943). In that case, a federal statute permitted Oklahoma to construct a highway across allotted Indian lands. The question was whether Oklahoma could in turn permit the Oklahoma Gas Co. to place electrical service lines over a portion of the highway. *Id.* at 207. The United States argued that its permission to Oklahoma did not submit the scope of the highway use to determination under state law. The Court refused to hold that Congress

intended to limit such a grant in a matter so "commonly subject to local control," stating:

> "It is well settled that a conveyance by the United States of land which it owns beneficially or, as in this case, for the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary intention, according to the law of the State where the land lies." *Id.* at 209-210.

There being, the Court held, no ". . . governing administrative ruling, statute, or dominating consideration of Congressional policy to the contrary . . .", state law would be applied. *Id.* The Court went on:

> "The interpretation suggested by the Government is not shown to be necessary to the fulfillment of the policy of Congress to protect a less-favored people against their own improvidence or the overreaching of others; nor is it conceivable that it is necessary, for the Indians are subject only to the same rule of law as are others in the State. . . .
>
> "Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this it would have made its meaning clear." *Id.* at 211.

Thus *Oklahoma Gas* requires at the least an unequivocal expression from Congress before federal law may usurp a State's law of real property. No such Congressional intent can be shown here. In fact, in the Treaty with the Omahas Congress appears to have intended specifically no breach of state sovereignty in real-property matters, since the Treaty expressed an intent that certain incidents of the

Omahas' property rights were to be governed by state law. Act of March 16, 1854, Art. 3, 10 Stat. 1044. Also it cannot be shown that the application of federal law is necessary to fulfill the policy of Congress to protect Indians "against their own improvidence or the overreaching of others." Application of state law to determine the effect of acts of nature upon the property boundary separating lands of an Indian tribe from those of a sovereign State cannot responsibly be asserted to be contrary to any Congressional policy in favor of Indians. Nor has any showing been made that application of the state rules of river movement urged by Iowa would subject the Omahas to any different or additional burden from that of any other litigant in a case of this nature.

This Court has thus consistently held that Indian land titles are subject to the same state laws of real property that apply to other lands within the State. The Tenth Circuit is in accord. *Herron* v. *Choctaw and Chickasaw Nations,* 228 F.2d 830, 832 (10th Cir. 1956); *Choctaw and Chickasaw Nations* v. *Seay,* 235 F.2d 30, 35 (10th Cir. 1956), *cert. den.* 352 U.S. 917 (1956); *see U.S.* v. *Champlin Refining Co.,* 156 F.2d 769, 773 (10th Cir. 1946), *aff'd per curiam* 331 U.S. 788 (1947); *see also Stone* v. *McFarlin,* 249 F.2d 54, 56 (10th Cir. 1957). The *Seay* decision is particularly apropos. In that case the court resolved a dispute between the tribe and a subsequent allottee of a portion of the tribe's reservation lands concerning the boundary of the reservation by applying state law. *Seay, supra,* 235 F.2d at 35.

The Eighth Circuit relies heavily on *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974), for their assertion that state law may not be applied in this case.[4] *See Wilson III, supra,* 575 F.2d at 630. In *Oneida,* litigation was instituted in federal court by the Oneida Tribe alleging that 1788 and 1795 cessions by the Tribe to the State of New York were without consent of the United States and thus did not terminate the Indians' aboriginal rights. *Id.* at 664-665. The Court held that the Oneida Tribe's assertion of a right to possession, termed "aboriginal title," was that of a right conferred by federal law. *Id.* at 666. It explained that under accepted doctrine only the United States could terminate aboriginal title, *id.* at 667, and that through the passage of the Non-Intercourse Act in 1790, Act of July 22, 1790, 1 Stat. 137, the United States had asserted federal primacy in the area. *Id.* Since the Oneidas' aboriginal right of possession had been recognized by the United States, *id.* at 668-669, and thus arose under federal law, *id.* at 675, the Court wrote:

> "In the present case, however, the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Id.* at 677.

[4] Reliance, albeit misplaced, is also given to *Confederated Salish & Kootenai Tribes* v. *Namen,* 380 F.Supp. 452, 461 (D. Mont. 1974, *aff'd,* 534 F.2d 1376 (9th Cir. 1976), *cert. denied,* 429 U.S. 929 (1976). That case involved the question whether a riparian allottee of land wholly within an Indian reservation had the right to wharf out over a lake bed held by the United States in trust for Indians. Neither the facts nor the issue in that case are remotely related to the matters before the Court here.

But unlike *Oneida*, this case presents no issue of aboriginal title or wrongful termination thereof. The Omahas' rights are circumscribed by the Treaty of 1854, pursuant to which the Tribe relinquished all title claims to lands east of the main channel of the Missouri River, and received from the United States lands west thereof. Unlike New York in *Oneida*, Iowa is not trying to extinguish without the approval of Congress an aboriginal right of possession that only Congress can extinguish; Congress has already extinguished that title and substituted a specific grant of lands in lieu of it. And certainly Iowa is not contending that the Treaty of 1854 is invalid, or that the Omahas took no lands thereby. On the contrary, all parties recognize the validity of the Treaty, and of the Omahas' title thereunder. And all recognize that the eastern boundary of the reservation lands was made the center of the main channel of the Missouri River, that this boundary was intended as an ambulatory boundary, and that the River has moved in location markedly since 1854. The question is simply the effect upon the location of the boundary of those movements of the river, and Iowa asserts, quite correctly, that that effect must be determined according to state law.

C. No Showing Has Been Made That the Application of a Federal Common Law of River Movement Would Promote the Federal Interest In Protecting the Rights of the Omahas. On the Contrary, It Is Clear That Applying State Law Would Advance That Interest.

In *U.S. v. Standard Oil Co.*, 332 U.S. 301 (1947), this Court set forth considerations to influence choice of law

when it is asserted a strong federal interest compels the application of federal law. These considerations are the nature of the specific governmental interests, the effect upon these interests of applying state law, federal supremacy in the performance of federal functions, the need for uniformity and the need of a State to apply its own laws. *Id.* at 309-310. In *Wallis v. Pan American Pet. Corp.*, 384 U.S. 63 (1966), the Court allowed the application of state law to determine the transferability of a federal lease. *Id.* at 71. The Court found there was no significant conflict between the application of state law and the federal interest, *id.* at 68, nor any

> ". . . showing that state law is not adequate to achieve it." *Id.* at 71.

These considerations are pertinent here. Nothing offered by the Eighth Circuit, the Omahas or the United States lends any credible support to the assertions that the choice of federal common law is necessary to promote the Government's interest in protecting the rights of Indians. Certainly the United States has such an interest. But it is not enough to assert that the law of one jurisdiction should apply simply because that jurisdiction has a policy it wishes to advance. It must be shown that the application of state law would significantly conflict with the Government's interest, or that application of federal law would promote that purpose. *Wallis, supra*, 384 U.S. at 68, 71; Restatement (Second) of Conflict of Laws § 6, Comment (1971); E. Cheatham and W. Reese, *Choice of the Applicable Law*, 52 Col. L. Rev. 959, 965, 972 (1952). Here, no such showing has been made.

To avoid the application of state law, the United States declares incredibly that "[t]o apply state law in the instant case would, in effect, permit the state unilaterally to abrogate rights created by treaty and continuously protected by the United States." Brief for the United States in Opposition to the Petitions for a Writ of Certiorari, p. 15. This statement is untrue. Continuing to allow the States to apply their own laws to property would give them no more ability to "abrogate" property rights than they would otherwise possess. For no State can abrogate property rights without affording the constitutional guarantees of equal protection, due process, and of course just compensation. The characterization of this lawsuit by both the United States and the Court below as an attempt "to abrogate" or "extinguish title to tribal reservation land," *id.*, *Wilson III, supra,* 575 F.2d at 629, 630, is question-begging. The attempt here is not to "extinguish" but to ascertain the true titles to disputed lands, and the geographical extent of those titles. Ironically, the Eighth Circuit's decision quiets the Omahas' title to lands *beyond* the 1867 Barrett Survey line, lands that accreted to the Omahas' side of the river after that survey. If the United States and the Eighth Circuit are to be consistent, should not this case be characterized also as an attempt by the Government and the Omahas to "extinguish" the titles of Iowa and the Iowa riparian landowners?

No more than can the use of state law be shown to frustrate the Government's interest can the application of federal law be shown to promote that interest. The Eighth Circuit offers no explanation how the application of the federal law of accretion and avulsion promotes the Government's interest. *See Wilson III, supra,* 575 F.2d at 629-631. Nor does the United States attempt such an explanation in its brief in opposition to the petitions for writs of certiorari herein (see pages 14-16 thereof). Only in its brief in the Court below does the Government even approach the question. It offered this vague explanation how the use of federal law would promote the Indians' interests:

> "The federal law of avulsion and accretion, to the degree that it is different from state law, should apply here. We would only point out that that law does not deal solely with clear-cut rules, but balances competing policies of the law." Brief for the Appellant, United States of America, Appellant, v. Roy Tibbals Wilson, et al., U.S. Court of Appeals for the Eighth Circuit, No. 77-1387.

The Government cannot even say whether federal law differs from the state law of accretion and avulsion, let alone demonstrate how the application of federal law promotes its interest. (It may well be that the result would have been the same had state law applied.[5]) It has, however, made a case for the application of state law. The United States appears to concede the federal law of river-boundary changes lacks the precision, predictability and thorough development of state-law systems. Even the Eighth Circuit could not say, for example, whether the body of federal common law contains the principle quite common among state-law systems, that river movements are presumptively

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[5]Interestingly, as to lands within the present political borders of Iowa, Iowa law may require the application of Nebraska law as to any lands that were within the borders of Nebraska prior to the 1943 Compact. Iowa-Nebraska Boundary Compact, Iowa Code 1971, p. lxiv, Iowa Acts 1943, c. 306, § 3. The content of Iowa's law of course, is not of consequence here.

accretive and not avulsive. *Wilson III, supra,* 575 F.2d at 632 n. 22.[6] The *Erie* Court was quite correct, for more reasons than one, in declaring "There is no federal general common law." *Erie R. Co., supra,* 304 U.S. at 78.

> "*Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of every day affairs." *Hanna v. Plumer,* 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

So it is plain, we submit, that the interests of the Indians would be far better served if their lands were subject to the same laws as the lands of other citizens of the State. For without the uncertainty as to what rule a federal court might fashion for each occasion, an Indian's title could be analyzed in the clear light of a fully developed state-law system. The selection of state law would achieve uniformity of result, predictability of result, and ease of application, all factors that should be considered in choosing the applicable law. *See* Restatement (Second) of Conflict of Laws § 6 (1971); Cheatham and Reese, *supra.*

Plainly chaos would result if the Eighth Circuit's decision is upheld. For we would not simply have a system of federal common law for property owned by Indians, and a system of state law for property owned by non-Indians. Since boundary determinations affect the landowner on each side of the boundary, federal common law would constitute the law applicable to Indians, as well as their

[6]There is in fact such a presumption. *See Mississippi* v. *Arkansas,* 415 U.S. 289, 294 (1974), approving the Special Master's report, which was predicated on the presumption, and citing with approval *Pannell* v. *Earls,* 483 S.W.2d 440, 442 (Ark. 1972).

non-Indian neighbors. Only non-Indians having no Indian neighbors could be certain that their titles would remain subject to state and not federal law, at least until an Indian acquires the property next door. And if Indian property rights are to be construed according to federal common law, do we have the same result when the Government asserts it has a special interest in promoting the welfare of other classes of persons who may have been disadvantaged? And if Indians are to have their land titles construed according to federal law, what of their contracts, or their torts? This Court foresaw long ago that chaotic consequences could follow from adopting two discrete systems of land law within a State:

> "The interpretation suggested by the Government is not shown to be necessary to the fulfillment of the policy of Congress to protect a less-favored people against their own improvidence or the over-reaching of others; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the State . . . .
>
> "Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this it would have made its meaning clear." *U.S. v. Oklahoma Gas Co., supra,* 318 U.S. at 211.

III

SECTION 194 MAY NOT CONSTITUTIONALLY BE USED TO DEFEAT A STATE'S CLAIM UNDER THE EQUAL-FOOTING DOCTRINE TO SOVEREIGN LANDS

In an unprecedented decision, the Eighth Circuit applied Section 194 to the State of Iowa (as it did to the other non-Indian claimants), requiring Iowa to assume the burden of persuasion upon its claims to sovereign lands. Iowa's failure to prevail on those claims is in large measure attributable to that application of Section 194, which amici contend was unconstitutional.

Section 194 provides that in trials between an Indian and a white person concerning property, the burden of proof is placed on the white person ". . . whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." Application of Section 194 in this case raises several questions: whether the statute by its own terms applies to this controversy;[7] whether it violates the equal-protection guarantees of the Constitution; and whether it violates the Tenth Amendment's guarantee that the States may apply their own laws to determine titles to lands within their borders. We do not address these questions, which we understand will be adequately treated by the parties and by other *amici*, but we do address another: whether the statute may be applied against a State asserting its title to sovereign lands.

[7]Certainly by its own terms the statute does not apply to the State of Iowa, for Iowa can in no sense be deemed a "white person." It is a sovereign entity composed of people of all races, including Indians.

The Eighth Circuit found that the ". . . [Omahas'] treaty established the [Omahas] as the legal titleholder to the land area within the Barrett Survey [Area, including lands in present bed of the Missouri River claimed to be sovereign lands of Iowa.]" *Wilson III, supra*, 575 F.2d at 631. This finding, the Court held, raised the presumption of title required by Section 194. *Id.* Having thus found "previous possession or ownership[8] based upon physical conditions obtaining in 1867, the Eighth Circuit held

> ". . . notwithstanding the subsequent movement of the thalweg of the Missouri River, the non-Indian claimants were required to assume the burden of proof to show that the Indians no longer had lawful title to the reservation land in question." *Wilson III, supra,* 575 F.2d at 633.

Thus, Iowa was required to prove the Omahas did not have lawful title to the bed of the Missouri River east of the present main channel, prima facie sovereign lands of Iowa by virtue of the Equal-Footing Doctrine.

As consequence of the operation of Section 194, the United States, which has immunized itself from quiet-title actions concerning lands held in trust for Indians, 28 U.S.C. section 2409a(a), was able to initiate this litigation, and yet saddle Iowa and the non-Indian claimants with the burden of proving their case in disregard of the traditional

[8]It is not clear whether mere "aboriginal" title can constitute the previous possession or ownership sufficient to raise the presumption of title in an Indian tribe. "Aboriginal" possession or ownership is the non-treaty right of occupancy recognized by the United States in the nomadic Indian tribes, protected by the United States from third-party intrusion and terminable only by the United States. *See Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 279 (1955). Amicus does not understand "aboriginal" title to be involved in this case.

rule that a claimant must recover, if at all, on the strength of its own title. *Shapleigh v. Mier*, 299 U.S. 468, 475 (1937); *Wilson I, supra*, 433 F.Supp. at 66; *Wilson II, supra*, 433 F. Supp. at 88.

That this shift in the burden of proof had a profound effect on the result reached by the Eighth Circuit is clear. The Omahas' claims are founded on what was characterized in *Corvallis, supra*, 429 U.S. at 367, as the "so-called exception to the accretion rule." *Wilson III, supra*, 575 F.2d at 638. In *Kansas v. Missouri, supra*, 322 U.S. 213, the claims made by Kansas were remarkably similar, factually and legally, to the claims here being made by the Omahas. The Court wrote in that case:

> "Both by virtue of her position as complainant and on the facts, Kansas has the burden of proof in this case. [Citation omitted.] The disputed location was in Missouri in 1900. It lies on the Missouri side now and has done so, by practically all the evidence, since at least 1927 or 1928. *These facts put upon Kansas the burden of showing that in the meantime the land lay on the Kansas side of the main channel by virtue of natural changes which were effective to change the jurisdiction.*" *Id.* at 228. (Emphasis supplied.)

Not surprisingly, Kansas was unable to carry that burden, and the lands in dispute were held to have been in Missouri. *Id.* at 232. In the present case the Court of Appeals acknowledged that proving the nature of the river's movement was ". . . indeed an onerous burden." *Wilson III, supra*, 575 F.2d at 651. Particularly in view of the fact that Iowa had prevailed on her claims in the District Court, her failure to prevail in the Eighth Circuit is largely attributable to the application of Section 194.

This federal statute purporting to create a presumption in favor of the adverse claimant may not constitutionally be applied against a State claiming sovereign title to the bed of a navigable stream pursuant to the Equal-Footing Doctrine. The *Corvallis* decision unmistakably provides that this application contravenes ". . . an unbroken line of cases which make it clear that the title thus acquired by the State [to lands underlying navigable waters by virtue of the Equal-Footing Doctrine] *is absolute so far as any federal principle of land titles is concerned.*" *Corvallis, supra*, 429 U.S. at 374.

CONCLUSION

Amici respectfully submit that in this case of acute interest to each State of the Union, the decision of the Court below to apply federal common law and to apply Section 194 to a claim of sovereign-land title shatters long-held precepts fundamental to the fabric of our federal system. Amici urge that this Court overturn the decision of the Eighth Circuit and reaffirm the inveterate rule that allows each State to apply its own real-property law to determine land titles within its borders, regardless of who claims ownership of the property in dispute and, as well, to have its sovereign lands free of any federal principle of land titles.

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In The

Supreme Court of the United States

October Term, 1978

NO. 78-161

STATE OF IOWA, STATE CONSERVATION COMMISSION of the STATE OF IOWA,
Petitioners,

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R. G. P. INCORPORATED, DARREL L., HAROLD M. AND LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON AND TRAVELERS INSURANCE COMPANY,
Respondents (Petitioners on Separate Petitions),

vs.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA,
Respondents.

BRIEF OF AMICI CURIAE IN SUPPORT OF THE STATE OF LOWA

States of Indiana, Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming

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AUTHORITY TO FILE AMICI CURIAE BRIEF

The States of Indiana, Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North

Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, through their Attorneys General, respectfully submit this joint brief as amici curiae under the authority of Rule 42 (4), United States Supreme Court Rules. It is in support of the Brief of the State of Iowa and the State Conservation Commission of the State of Iowa on Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit granted November 13, 1978.

—o—

INTEREST OF AMICI CURIAE

The basic interest of the *amici* states is described by this Court in *Martin v. Waddell,* 41 U. S. 367 (16 Pet. 1842) as follows:

> For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government . . . 41 U. S. at 410.

While the states are subject to the right of the Congress to regulate commerce among the states, United States Constitution, art. I, § 8, the bed and bank of navigable waters to the ordinary high water mark is reserved to the several states. *Pollard's Lessee v. Hagan,* 44 U. S. 212, 230 (3 How. 1845); *Mumford v. Wardwell,* 73 U. S. 423, 436 (6 Wall. 1867). States admitted to the Union since the Revolutionary War have acquired full title to the bed and bank of navigable waters to the ordinary high water mark by virtue of the equal footing doctrine incorporated

in their admission acts. *Shively v. Bowlby,* 152 U. S. 1, 26 (1843); *Bonelli Cattle Co. v. Arizona,* 414 U. S. 313, 318 (1973).

The title the states thus acquired was:

> ". . . held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish. . . . [citations omitted]. *The State holds the propriety of this soil* for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of that fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. *This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held. . . .* [citations omitted]". *Smith v. Maryland,* 50 U. S. 71, 74-75 (18 How. 1855). (Emphasis supplied.)

It was also a title

> ". . . different in character from that which the State holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. *It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein* freed from the obstruction or interference of private parties. . . ." *Illinois Central Railroad v. Illinois,* 146 U. S. 387, 452 (1892). (Emphasis supplied.)

As to the portion of the Missouri River that forms the general boundary between Iowa and Nebraska, Iowa claims sovereign ownership and jurisdiction over the bed

and bank of that River from the boundary to the ordinary high water mark in Iowa. This Court has recently affirmed the basis of such claim in *Oregon v. Corvallis Sand and Gravel Co.*, 429 U. S. 363, 370 (1977) holding,

> "... Although Federal law may fix the initial boundary line between fast lines and the river beds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law."

In regard to Iowa, the Eighth Circuit has divested that state of sovereign title by an application of what it claims is federal common law rejecting specifically the application of state laws thereon. The *amici* states find themselves threatened by this invasion of sovereignty and unable to reconcile this case with this Court's holding in *St. Louis v. Rutz,* 138 U. S. 226, 242 (1891):

> "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the waters edge, is a question in regard to a rule of property, which is governed by local law. (Citing cases)."

or the case of *Joy v. St. Louis,* 201 U. S. 332, 342, 343 (1906):

> "In this case the real dispute, as stated by the plaintiff, is whether plaintiff is entitled to the land formed by accretion, which has taken place many years since the patent was issued and since the acts of Congress were passed.
>
> • • •
>
> "As the land in controversy is not the land described in the letters patent or the acts of Congress, but, as is stated in the petition, is formed by accretions or gradual deposits from the river, whether such land belongs to the plaintiff is, under the cases just cited, a matter of local or state law, and not one arising under the laws of the United States."

The possibility of harmful and unjust results from this application of the Eighth Circuit's interpretation of the choice of law and federal common law is magnified by the use of 25 U. S. C. § 194 to cast the burden of proof upon the "white person" whether that "person" be a claimant or defendant. The Eighth Circuit concluded that "white person" included not only the individual parties to this action, which included corporations, but one of the sovereign states as well, namely Iowa. The potential scope of this case's holding could affect sovereign land title to millions of acres of State land throughout the United States. For these reasons, the *amici* states respectfully request that their contentions be considered with those of the State of Iowa.

—o—

BRIEF OF AMICI CURIAE

QUESTIONS PRESENTED

1. Whether the Eighth Circuit's application of 25 U. S. C. § 194 creates a predisposition contrary to the judicial standards of the Supreme Court.

2. Whether the holding of the Eighth Circuit is contrary to congressional intent in enactment of 25 U. S. C. § 194.

3. Whether the holding of the Eighth Circuit that Federal Common Law, not State Law, applies is erroneous.

4. Whether the Eighth Circuit's interpretation of Federal Common Law of accretion and avulsion is erroneous.

5. Whether the Eighth Circuit erred in reversing the trial court's findings of fact.

———o———

SUPPLEMENTARY STATEMENT OF THE CASE

The *amici* adopt the statement as set forth in the State of Iowa's Brief.

———o———

ARGUMENT

I.

The Eighth Circuit's application of 25 U. S. C. § 194 creates a predisposition contrary to the judicial standards of the Supreme Court.

The statute at issue herein is 25 U. S.C. § 194 (hereinafter § 194) which states:

> "In all trials about the right of property in which an Indian may be a party on one side and a white person on another, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

The district court (Judge Bogue) considered that provision in the following manner:

> "The above quoted provision is, by its terms, triggered when an Indian person in a title dispute has offered evidence to show previous possession or ownership of the land in question. In this case, Plaintiffs could make out such a *prima facie* case by establishing that the land now within the Barrett Survey Line of the Blackbird Bend Area is land (or accretions to such land-in-place) left undisturbed and in place through and following an avulsive change of the river channel. If Plaintiffs establish this fact, however, they have not only triggered the application of 25 U. S. C. § 194 but also have proved their entire case and establish their right to relief in the form of decree quieting title. On the other hand, if the land now within the Barrett Survey line is land which has accreted to the Iowa shore as Defendants claim, then the land which the Tribe possessed and owned at the time the Omaha Reservation was established has been washed away and replaced. If the evidence supports a finding that the land in question is accretion land to the Iowa shore, then Defendants have proved their case as well as overcome any burden which 25 U. S. C. § 194 might place upon them. In that event, the land now within the Barrett Survey Line simply would not be the land which the tribe once possessed and owned, although it would occupy the same location. In short, the question of whether 25 U. S. C. § 194 applies in this case is inextricably entwined with the merits."

The Eighth Circuit responded:

> "We reject this reasoning."
>
> "Application of § 194 is not a self-answering inquiry to the issues at hand. [Footnote omitted.] To hold otherwise, one must presume that the reservation land has in fact been destroyed. Furthermore, the trial court's reasoning would negate the application of the § 194 statutory burden upon a pleading that simply recites Indian land had been destroyed by the erosive action of the river. Thus, under the trial

court's rationale a party making a claim to Indian land could defeat the congressional mandate by mere allegation without proof." (Appendix to Petition pp. A20-A21).

The reasoning of the Eighth Circuit in rejecting Judge Bogue's analysis of the application of § 194 creates legal precedent far more dangerous and less persuasive than that of the district court.

The Eighth Circuit is saying, in effect, "So that we can apply § 194, we will presume there was an avulsion in this case." They make that assumption despite the fact that neither federal common law [*Nebraska v. Iowa,* 143 U.S. 359 (1892); *Louisiana v. Mississippi,* 384 U.S. 24 (1966)] nor Nebraska law as applied below by Judge Bogue (Appendix to Petition, pp. C8 to C17), favor or presume avulsion change of a river. Indeed Iowa common law presumes accretion when a river has moved. (Appendix to Petition pp. A24 and C18).

It almost appears as though the Eighth Circuit decided to use whatever presumptions were necessary to apply § 194. The decision follows a protectionist sentiment—a remnant of times when Indians were underrepresented, if represented at all.

This Court has long interpreted language in Indian Treaties and the statutes approving them in such a way as to resolve any ambiguities in favor of the Indian Tribe involved. *Antoine v. Washington,* 420 U.S. 194 (1975). This too has caused considerable problems in lower court statutory interpretations which involve Indians, but not treaties or approval legislation. Even giving "the broadest possible scope" to the rule by which

ambiguities are resolved in favor of Indians, a "cannon of construction is not a license to disregard clear expressions of tribal and congressional intent." *DeCoteau v. District County Court,* 420 U.S. 425 at 447 (1975).

In this case, 40 years (or more) of peaceful possession was terminated by an invasion of Indians representing the tribe and (allegedly) the United States (Appendix to Petition, p. C19). The Iowa landowners were granted relief from trespass in the state courts, but the Indian invasion was sanctioned and the Tribe and the United States were granted possession by Judge McMannus on June 5, 1975, against all rules of equity relating to peaceable possession because the Plaintiffs (Respondents here) were Indians and "a preliminary injunction is an appropriate provisional remedy when special federally protected rights of Indians are threatened." (App. 123).

Despite language seemingly granting the State of Iowa status to challenge the temporary injunction, physical possession of her sovereign land was summarily granted to the Tribe by Judge McMannus of the Northern District of Iowa on October 7, 1975 (See Order of that date in records).

This Court should clarify Indian law so it is beyond question that the duty of special consideration to Indian tribes devolves upon the Executive branch only. Just as the Legislative branch remains free to enact without fetter any legislation affecting Indian tribes, including the unilateral termination of Indian Treaty provisions, *The Cherokee Tobacco,* 11 Wall. (78 U.S.) 616 (1871), *Thomas v. Gay,* 169 U.S. 264 (1898), so the judiciary

must remain impartial, favoring naught but equity and the Constitution and just application of both.

A rule that the executive, as guardian of its Indian wards, must interpret the laws to the Indians' favor, may arguably be equitable. *Joint Tribal Council of Passamaquoddy v. Morton,* 528 F. 2d 370 (1st Cir., 1975). But such cases should apply to the executive, not the judiciary.

Inferior tribunals have come to believe that there is a requirement for judicial partiality for Indian claims, because in the past the Tribes often lacked effective legal representation. But it is clear that today the Indians are well represented by the United States and the Department of Justice, with all its resources. Moreover, in this case, the tribe is also represented by an attorney of the tribe's choice, under contract to the Executive Branch of the Federal Government, and paid by federal funds.

The result of this historical bias is an inequitable predisposition in the lower federal courts in favor of Indian claims, even when, as here, the actor is not man but a river.

II.

The holding of the Eighth Circuit is contrary to the congressional intent in enactment of 25 U. S. C. § 194.

In applying 25 U. S. C. § 194 to the facts of this case, the Eighth Circuit has cast the burden of proof upon

a state and one of its agencies by designating them as a "white person" within the meaning of § 194. The State of Iowa and its agency should not be so classified.

In labeling a state as a "white person", the Eighth Circuit erred in several respects. First, a reading of "person" to include states violates the plain meaning of the word. See *South Carolina v. Katzenbach,* 383 U. S. 301, 323 (1966), which held that a state is not a "person" under the Due Process clause of the Fifth Amendment. In addition, states have never been held to be "persons" under the Civil Rights Act of 1871, 42 U. S. C. § 1983. *Fitzpatrick v. Bitzer,* 427 U. S. 445, 452 (1976). Second, in *United States v. Perryman,* 100 U. S. 235, 237 (1880), this Court held, in the face of an argument that the words "white person", as used in the 1834 Indian Non-Intercourse Act, Act of June 30, 1834, 4 Stat. 733, meant "non-Indian", that that term means only the white race and does not mean any race other than Indian. Thus, the mixture of races in the state's citizenry precludes the Eighth Circuit's application of this statute. Section 22 of that 1834 Act contains the language that is now 25 U. S. C. § 194.

Third, prior statutes, which date back to 1790, show that the section was not intended to apply to the present facts. As indicated above, the language of § 194 comes from Section 22 of the 1834 Indian Non-Intercourse Act, which was a modification and extension of the 1822 Indian Non-Intercourse Act, Act of May 6, 1822, 3 Stat. 682. The § 194 language in the 1822 Act used "Indians" in plural form. The 1834 Act changed "Indians" to "an Indian", which is the present form of § 194.

Fourth, the language of other sections of the 1834 Act demonstrates a deliberate effort of Congress to apply § 194 only in cases involving land problems of individual Indians. Thus, Section 11 of that Act states in relevant part:

> "That if any person shall make a settlement on the lands belonging, secured or granted by treaty with the United States to any Indian *tribe,* or shall survey or shall attempt to survey such lands, or designate any of the boundaries by marking trees or otherwise, such offender shall forfeit and pay the sum of one thousand dollars." (Emphasis supplied.)

Section 12 of the 1834 Act provides, in part:

> "That no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian *nation* or *tribe of Indians,* shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution." (Emphasis supplied.)

Section 12 in the 1834 Act also amended the language of the 1802 Indian Non-Intercourse Act, Act of March 30, 1802, 2 Stat. 141, which made any conveyance of land "from *any Indian or nation or tribe of Indians* invalid, unless conveyed by treaty or convention." The 1834 Act dropped the word "Indian" from that sentence to read "any nation or tribe of Indians," thus carefully clarifying the distinction between land owned by a tribe and land owned by an individual Indian.

Fifth, Sections 4, 7 and 8 of the 1834 Act show additional Congressional intent as to the meaning of the terms "an Indian" and "a white person" in Section 22 of that Act. All contain penalties against "any person other than an Indian", showing that Congress knew how

to make such a general classification if it chose to do so and thus that "white person" is a specific racial classification referring to a white individual. It further shows that the words "an Indian" in Section 22 of the 1834 Act refer to an individual person.

The *amici* states support the State of Iowa in urging reversal of the Eighth Circuit's application of 25 U. S. C. § 194 which threatens any state subject to Indian tribal claims.

If this Court upholds the Eighth Circuit's application of 25 U. S. C. § 194, then it must examine the constitutionality of that statute and find it facially unconstitutional under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

As shown by our arguments above and the plain wording of § 194, that statute discriminates in favor of members of the American Indian race by casting the burden of proof upon members of the white race in all litigation involving right to real property. Except under this statute, the burden of proof is always upon the *plaintiff* in virtually all cases and jurisdictions. Here the burden is determined only by one's racial ancestry. In reviewing such a racial distinction, this Court stated in *Loving v. Virginia,* 388 U. S. 1, 11 (1967):

> "Over the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' *Hirabayashi v. United States,* 320 U. S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny,' *Korematsu v. United States,* 323 U. S. 214, 216

> (1944), and, *if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.*" *Loving v. Virginia,* 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed. 2d 1010, 1017 (1967). (Emphasis supplied.)

The Eighth Circuit has failed to demonstrate that the discrimination of § 194 is "necessary" to the accomplishment of a permissible legislative objective. Its reliance upon *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed. 2d 290 (1974) is misplaced. In *Regents of the University of California v. Bakke,* — U.S. —, 98 S.Ct. 2773 (1978) this Court discussed *Morton v. Mancari* as follows:

> "Petitioner also cites our decision in *Morton v. Mancari,* 417 U.S. 535 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari,* we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of BIA is *sui generis.* Id., at 554. Indeed, we found that the preference was not racial at all, but 'an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to groups [,] . . . whose lives are governed by the BIA in a unique fashion.'"

In *Mancari,* this Court said at page 554:

> "Here the preference is reasonably and directly related to a legitimate, non-racially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination."

Section 194 has no "non-racially based goal". The Eighth Circuit acknowledged that the statute was premised on a policy of preferential, protectionist treatment of Indians. 575 F. 2d 632. In footnote 20 on page 632 a citation is made to a 1924 U. S. Attorney General's Opinion, 34 *Op. Attorney General* 439 (1925), which discusses this policy. The first sentence states that "from the beginning of its negotiations with the Indians, *the Government* has adopted a policy of giving them the benefit of the doubt . . . ", and the last sentence concludes "Treaties have been considered, not according to their technical meaning, but in the sense in which they would be naturally understood by the Indians."

Iowa's situation is quite unlike that described. It involves the United States and the Omaha Tribe, capably represented by their lawyers, asserting a claim to property also claimed by individuals, a corporation and the State of Iowa, also capably represented. The basis for the preferential treatment of Indians is lacking. This is not a case involving interpretation of a vague treaty which could have been worded to take property from an Indian Tribe. Title to this land will be determined (and was) by the application of legal principles of accretion and avulsion, not by interpreting the terms of the 1854 Treaty, 40 Stat. 1043. The historic basis for preferential treatment is no longer present and any "necessity" so critical to the validity of this facially discriminatory statute has disappeared.

The concern of the *amici* should be apparent. If allowed to stand, the Eighth Circuit's decision designates the state "a white person" and then casts the burden of proof upon that state to prove good title to land. A state is not a "person" for purposes of direct application of Fifth Amendment protection of property rights

but as held in *South Carolina v. Katzenbach,* 383 U.S. 301, 323-24 (1966):

> "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union. . . . [However] objections to the Act which are raised under these provisions may be considered . . . as additional aspects of the basic question presented by the case: Has Congress exercised its powers . . . in an appropriate manner with relation to the States?"

Often a state may have no *record* title to its land, and never to its sovereign land. Now, in the Eighth Circuit, all statutory presumptions of record title are lost and race determines who has the burden when an Indian claims the land. No land in the United States is immune from such a challenge since it was all "possessed", or is now claimed to have been possessed, by an Indian tribe or tribes at one time or another. Indian Land Cessions in the United States, 18th Annual Report, Bureau of American Ethnology, Part 2 (1899). Indeed, as this court has held, *United States v. Santa Fe Railroad,* 314 U.S. 345 (1941); *Johnson v. McIntosh,* 21 U.S. 543 (1823); *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831); *The Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974), aboriginal title is a possessory right and if the Eighth Circuit's decision herein is allowed to stand, any Indian tribe held to have aboriginal title under the Indian Claims Commission Act, Act of August 12, 1946, 60 Stat. 1049 (1946) would have possession under § 194. The results can be unimaginably far reaching.

III.

The holding of the Eighth Circuit that federal common law, not state law, applies is erroneous.

In its decision, the Eighth Circuit recognized the basic rule that the laws of the states determine the ownership of riparian land, citing to *Oregon v. Corvallis Sand and Gravel Co., supra.* But the court found an exception, or what it characterized as a "caveat", 575 F. 2d 620, 628, citing to *Corvallis,* at 375:

> "If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between states, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary."

Thus, to support its determination that federal, rather than state, law was applicable, the Eighth Circuit concluded that this case involved a claimed change in the interstate boundary between Iowa and Nebraska as a necessary consequence of a claimed change in the boundary of the reservation. That conclusion was erroneous. In 1943, Nebraska and Iowa entered into a boundary compact which was ratified by Congress in Act of July 12, 1943, 57 Stat. 494 (1943). That compact set the boundary line between the states at the line in "the middle of the main channel of the Missouri River," defined as the "center line of the proposed stabilized channel of the Missouri River as established by the United States engineer's office . . . " *Nebraska v. Iowa,* 406 U. S. 117, 118 (1972).

By this compact, the boundary between the states was set upon the metes and bounds description of that center

line and recognized by Congress. The determination and resolution of the issues of this case will determine title to land, but it will not alter the boundary between the two states. The Eighth Circuit quoted from *Arkansas v. Tennessee,* 246 U. S. 158 (1918), but not as fully as this Court did in *Nebraska v. Iowa, supra,* at page 176:

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rule of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. . . . But *these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary from where otherwise it should be located.*" 575 F. 2d 620 at 628. (Eighth Circuit's cite italicized.)

The State of Iowa does not seek to "press back" the interstate boundary. It is her objective, and in the interest of all states appearing as *amici,* that the Courts be required to apply state law to determine title to land that exists within the borders of Iowa. It is crucial that this Court reverse the Eighth Circuit's radical departure from the general principles of river law, so recently reaffirmed in *Oregon v. Corvallis Sand and Gravel Co., supra.* As many of the *amici* states herein argued in *Corvallis,* undue confusion and forum shopping would result from the application of federal law by the federal courts and state law by state courts in adjudicating title in the same geographical area.

The Eighth Circuit's reasoning that federal common law applies because Indian trust land is involved requires consideration also.

In *Oregon v. Corvallis Sand and Gravel Co., supra,* at 370, this court held:

> " . . . Although Federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the river bed vests absolutely as of the time of its admission and is not subject to later defeasement by operation of any federal common law."

The Eighth Circuit distinguished this case from that authority by finding that the defendants (petitioners here) have attempted to extinguish the aboriginal title, which at one time may have been in the Omaha Tribe. 575 F. 2d 620 at 629. It cited to *Oneida Indian Nation v. County of Oneida,* 414 U. S. 661, 677 (1974), and *Confederated Salish & Kootenai Tribes v. Namen,* 380 F. Supp. 452 (D. Mont. 1974), *aff'd,* 534 F. 2d 1376 (9th Cir.), *cert. denied,* 429 U. S. 929 (1976) for support that federal common law applies. In the *Oneida* case, *supra,* land that was once possessed by the Oneida Tribe in the state of New York was ceded to the state without the approval of Congress. This Court held that a federal controversy existed within the requirements of 28 U. S. C. § 1331 and § 1362, and that federal law protects the possessory rights to tribal land. In *Namen, supra,* the defendant built a pier and wharf over a lake which was wholly within an Indian reservation. Again, this Court agreed with the Ninth Circuit that the United States, as trustee, held title to the lake bed and federal common law would determine riparian rights.

This present case is distinguishable from that authority. Here, no claim of adverse possession or illegal transfer of Indian land is involved. The question here is whether the geographic change was a result of accretion

or avulsion. The trial court's determination of this fact question was improperly overturned by the Eighth Circuit. The land in question is now situated within the boundaries of the State of Iowa by Act of Congress and Iowa was vested with title to the beds of rivers and streams when admitted to the Union of the United States. Act of December 28, 1846, 9 St. L. 117. In Iowa's case, that was eight years prior to the 1854 Treaty with the Omaha Tribe, 40 Stat. 1043, and 21 years before the Barrett Survey established the eastern boundary of the Omaha Reservation. In the *Namen* case, mentioned above, there was no question but that Indian land was involved. In *Oneida* the question of title was not decided, but this court held federal courts had jurisdiction to determine such title. The courts found that the federal trusteeship of Indian lands required federal law to be applied. The critical difference here is that *this land may not be Indian land* (indeed the trial court found it was not). To apply federal common law on the premise that Indian land is involved is a mistake analogous to the finding of previous Indian possession under 25 U.S.C. § 194. It begs the question by assuming the answer to the issue: Is the land, that now exists within Iowa's boundary, land in place after an avulsion and therefore Indian land or is it land resulting from accretion?

Decisions of this Court hold that state law should be applied to answer that question; *Oklahoma v. Texas,* 258 U.S. 574 (1922); *U.S. v. Oklahoma Gas Co.,* 318 U.S. 206 (1943); as does a prior decision of the 8th Circuit *Fontenelle v. Omaha Indian Tribe of Nebraska,* 430 F. 2d 143 (8th Cir., 1970). The Court should reverse

the 8th Circuit's attempt to re-write the rules on application of law.

IV.

The Eighth Circuit's interpretation of federal common law of accretion and avulsion is erroneous.

This Court should hold that State Law, not Federal Common Law, applies in this case as argued in Division III, but even in doing so, it should reject the Eighth Circuit's holding of what the Federal Common Law is.

The Federal Common Law and the law of Both Nebraska and Iowa, is as stated in 93 C.J.S. 750, 751, Waters § 76:

> "In determining whether an addition to land constitutes accretion, the length of time during which it is in the course of formation is not of importance. If it is formed by a gradual, imperceptible deposit of alluvium, it is accretion, but, if the stream changes its course suddenly and in such manner as not to destroy the integrity of the land in controversy and so that the land can be identified, it is not accretion."

The Eighth Circuit's decision rejects this principle of law and the authority of *Nebraska v. Iowa,* 143 U.S. 359 (1892). That case held that the identity of fast land in place is the essential factor in designating a channel change as avulsive rather than accretive and not the speed of the erosion and deposition of the land. The rejection of this reasoning creates a conflict with a long line of cases in this Court, other federal courts and state courts which have followed the holding of *Nebraska v. Iowa, supra.* See *Oklahoma v. Texas,* 260 U.S. 606, 637

(1923); *Louisiana v. Mississippi,* 384 U.S. 24; Special Masters Report, pp. 14, 15, 16; *Nebraska v. Iowa* 406 U.S. 117 (1972); *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313, 326 (1973), (overruled on other grounds, *Oregon v. Corvallis, infra); Mississippi v. Arkansas,* 415 U.S. 289, 291 (1974); *Oregon v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977).

See also, *Conkey v. Knudsen,* 143 Neb. 5, 8 N. W. 2d 538 (1943) vacating 141 Neb. 517, 4 N. W. 2d 290 (1942); *Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N. W. 647 (1935); *Iowa R. R. Land Co. v. Coulthard,* 96 Neb. 607, 148 N. W. 328 (1914). These and several other state cases—*Yutterman v. Grier,* 112 Ark. 366, 166 S. W. 749, 751 (1914); *Longabaugh v. Johnson,* 321 N. E. 2d 865, 867 (Ind. App. 1975); *Coulthard v. Stevens,* 84 Iowa 241, 50 N. W. 983, 984 (1892); *McCormick v. Miller,* 239 Mo. 463, 144 S. W. 101, 103 (1912); *Attorney General ex rel. Becker v. Bay Boom Wild Rice & Fur Farm,* 172 Wis. 363, 178 N. W. 569, 573 (1920)—which discuss identifiable land in place as one of the key factors in a finding of avulsion, all ultimately rely on either *Nebraska v. Iowa, supra,* or *Benson v. Morrow,* 61 Mo. 345 (1875). The Eighth Circuit reads the *Nebraska v. Iowa* case as an expansion rather than a limitation of the scope of avulsion, 575 F. 2d at 636. Such reasoning, nevertheless, does not allow two totally different concepts to govern in the same situation. Avulsion must be determined either by identifiable land in place or by the speed of the channel change.

The clearest example of the conflict of this decision with prior case law appears in the Special Masters report in *Louisiana v. Mississippi,* 384 U. S. 24 (1966), which asked the question:

> "Can there be an avulsion where the entire change in the channel takes place in the same riverbed, leaving no surface land between the two channels?"

The Master then answered the question in the negative, stating:

> "The Special Master's study of the applicable case law leads to the conclusion that there are but two rules—or rather one long-standing general rule and its exception—which can be applied to river boundary changes. The general rule is that the boundary follows the changes in the main navigable channel. The exception is that when there is a cutoff, natural or artificial, the old bend that has been cut off remains the boundary in that particular area. Louisiana contends that since the cutting of the new deep-water channel was not altogether a gradual process of erosion and accretion, it must be an avulsion.
>
> "This contention is untenable. All case law and all reasoning behind these rules point to the opposite conclusion—that the general rule of the 'live thalweg' is preferable and will be applied in all cases, unless there has been a clear and convincing avulsion. This avulsion must be sudden and perceptible . . . we have been unable to find any case, with facts similar to the instant case, in which an avulsion has been found by the Court where the river remains in the same bed of the stream. In all such cases the new channel was formed when the river 'suddenly leaves its old bed and forms a new one. . . .' *Arkansas v. Tennessee,* 246 U. S. 158, 173."

Special Master's Report, p. 17, confirmed, *Louisiana v. Mississippi, supra* (19-6).

The amici states urge the Court to reverse the holding of the Eighth Circuit on the federal common law of accretion and avulsion.

V.

The Eighth Circuit erred in reversing the trial court's findings of fact.

Nowhere in the opinion of the Eighth Circuit does it expressly state that it overrules the trial court's findings of fact. However, by holding that the Petitioners (Defendants below) failed to sustain their burden of proof and holding directly contrary to the trial court's findings in many instances (Appendix to Petition, pp. A39-40, pp. A44-45, pp. A48-49, p. A55, p. A56, and p. A65) that was the effect.

The Eighth Circuit has improperly substituted its evidentiary judgment for that of the trial court, which heard the witnesses and saw the exhibits and their interrelationship. This Court has long rejected that type of appellate review, leaving factual determination to the trial court. Rule 52a F. R. C. P.; *Zenith Corp. v. Hazeltine,* 395 U. S. 100 (1969).

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CONCLUSION

This is a case of major national significance. This brief is joined by states representing every circuit. The radical departures from traditional concepts governing title to riparian lands, as espoused by the Eighth Circuit,

should be reversed by our highest Court and the judgment of the trial court reinstated.

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